150 U.S. 99

RECORD, CASE Nos. 13,881 and 13,907.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM NO., ~~263~~.

CHARLES E. WAGER, APPELLANT,

vs.

THE PROVIDENCE WASHINGTON INSURANCE COMPANY OF PROVIDENCE, R. I., THE SECURITY INSURANCE COMPANY OF NEW HAVEN, CONN., HENRY MORSE AND ALANSON MORSE.

FILED OCTOBER 22, 1889.

TERM NO., ~~278~~ 49

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., APRIL 4, 1893.

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1 *Libel.*

To the Honorable Alfred C. Coxe, judge of the district court of the United States for the northern district of New York:

Libel and complaint of the Providence Washington Insurance Company, of Providence, Rhode Island, and of the Security Insurance Company, of New Haven, Connecticut, against Henry Morse and Alanson Morse, copartners, and Charles E. Wager, respondents in the case of the collision, civil and maritime, alleges as follows:

First. Your libellants, at all times hereinafter mentioned, were foreign corporations, carrying on the business of general marine insurance in the State of New York under the name of the "New England Underwriters."

Second. The aforesaid respondents, Henry Morse and Alanson Morse, were copartners at all the times hereinafter mentioned, in the city of Buffalo, New York, doing a business of shipping and forwarding goods and of carrying the same on the Erie canal, and the said respondents, Henry and Alanson Morse, and the said Charles E. Wager also reside within the jurisdiction of this court.

Third. That heretofore, to wit, on the 17th day of May, 1883, the respondents aforesaid, Henry Morse and Alanson Morse, undertook and agreed with one William Meadows, likewise of the city of Buffalo, to receive from the said Meadows, and safely and properly to carry, a cargo of 7,900 bushels of wheat, of the then true and lawful value of nine thousand two hundred and eleven and $\frac{75}{100}$ dollars ($9,211.75), which cargo was consigned to the firm of Armour, Plankinton & Co., who were its owners. Entering upon the discharge of the aforesaid contract, the respondents Henry Morse and Alanson Morse took from the said shipper the wheat aforesaid and put the same on board a canal-boat called the "William Worden," which boat "Worden" being without masts, sails or any motive power, was fastened to and made a part of the steam canal-boat called the "Sydney;" and the respondent Charles E. Wager was the master of these two boats, the "Sydney" and the "William Worden," the respondents Henry Morse and Alanson Morse signed the bill of lading or carriage; it is annexed to and forms part of this libel, and is marked "A." After the trip was begun, and during the partial performance of it, the boats "Sydney" and "William Worden" were fastened together, the stern of the "Worden" being attached to the "Sydney" and the former boat being pushed by the latter.

2

Fourth. The trip begun with these boats was carried on with comparative safety until Tuesday, the 29th day of May, 1883, when the aforesaid boats ran aground on an island in the Hudson river, called "Esopus island;" whereby the boat "Worden" was so damaged that she sank and her aforesaid cargo became a constructive total loss. Esopus island is in the Hudson river, between Poughkeepsie on the north, and Kingston on the south, and lies considerably nearer the eastern than the western shore; but there is a channel

on either side of it. At the north end of the island there is a cluster of rocks that extends above the island some two or three hundred feet, some of which rocks are visible at all stages of the tide, but others are submerged by high water. On the night of the 29th day of May aforesaid the atmosphere was clear and starlit, and the "Sydney" and the "Worden," while coming down the river, ran upon these rocks, and the "Worden" received the damages aforementioned.

3 Fifth. On the 7th day of May, 1883, your libellants did, under the name and style of the "New England Underwriters," insure and agree to indemnify against loss the aforesaid Armour, Plankinton & Co., the owners and consignees of the aforesaid cargo of wheat on the usual marine risks and perils of the voyage from Buffalo to New York, which insurance was effected by means of a certificate issued by Worthington & Sill, agents of your libellants, and called "Canal cargo certificate number 668," which, as to certain terms and conditions, was based upon an open policy of insurance previously given by your libellants to the respondents Henry Morse and Alanson Morse. This certificate was drawn to cover the amount of nine thousand eight hundred and seventy-five dollars ($9,875), which sum stood for the value of the cargo, and also for the interest of the respondents Henry Morse and Alanson Morse in the said cargo, as the carriers and advancers. After the loss as aforesaid had occurred the insured owners of the cargo, Armour, Plankinton & Co., made an abandonment of the said cargo to your libellants as for a constructive total loss thereof, and thereupon your libellants did pay the said insured owners the sum of nine thousand two hundred and eleven and $\frac{75}{100}$ dollars ($9,211.75), becoming subrogated to all the rights, claims and demands of the said Armour, Plankinton & Co. for and on account of the loss and damage aforesaid. Your libellants did pay the aforesaid firm of Henry and Alanson Morse, the respondents, the further sum of about six hundred and seventy dollars ($670), which was the amount of the interest of the said Henry and Alanson Morse in the said cargoes, freight and advances.

Sixth. That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and this court.

4 Wherefore your libellants pray that they may have process *in personam* against the respondents Henry Morse and Alanson Morse and Charles E. Wager, citing them to appear and answer on oath all matters hereinbefore set forth, and that they be decreed to pay to your libellants as damages the sum of nine thousand two hundred and eleven and $\frac{75}{100}$ dollars ($9,211.75), the amount of loss sustained by your libellants as insurers of the aforesaid firm of Armour, Plankinton & Co., owners of the aforesaid cargo, with interest from June 1st, 1883.

EDWARD D. McCARTHY,
Libellants' Proctor, 50 Wall Street, New York City.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Edward D. McCarthy, being duly sworn, says that he is the proctor for the libellants of this action; that said libellants are foreign corporations whose offices are in New Haven, Connecticut, and Providence, Rhode Island; the said libellants are absent from the district; that the foregoing libel is true, and the allegations herein contained are more within deponent's knowledge than that of the said libellants.

EDWARD D. McCARTHY.

Sworn to before me, this 5th day of May, 1887.

THOMAS J. DE LANEY,

[L. S.] *Notary Public, Kings Co., N. Y.*

Certificate filed in New York county.

5 EXHIBIT "A."

BUFFALO, *May* 7, 1883.

Shipped by W. Meadows, in apparent good order, on board the canal-boat "Wm. Worden," of Morse, whereof —— —— is master, the following-described property, to be transported to place of destination without unnecessary delay, and to be delivered as addressed on the margin, in like good order in the customary manner, free of lighterage, upon payment of freight and charges as prescribed in this bill. Consignees to pay all harbor-towing from and to the usual place of landing. Three week days, regardless of weather (including day of arrival), providing notice of arrival shall be given before four o'clock p. m., after arrival and notice of same, to be allowed consignees to discharge this cargo, —— —— or consignees are to pay demurrage at the rate of two and one-half per cent. per day upon freight, including tolls for each of every day of such demurrage over the three days as above specified, until the cargo is fully discharged. And it is agreed between the carriers and shippers and assigns, that in consideration especially of the rate of freight herein named, the said carriers having supervised the weighing of said cargo in board, hereby agree that this bill of lading shall be conclusive as between shippers and assigns and carriers as to the quantity of cargo received in board and to be delivered at port of destination, and that they will deliver the full quantity herein named. All damages caused by the boat or carrier, or deficiency in the cargo from quantity as hereon specified to be paid for by the carrier and deducted from the freight, and any excess in the cargo to be paid for to the carriers by the consignee. In case grain becomes heated while in transit, the carrier shall de-
6 liver his entire cargo and pay only for any deficiency caused by heating by exceeding five bushels for each one thousand bushels.

The freight charges and demurrage payable to as directed below, or order at place of destination, who is the only party

authorized to collect the same, and whose receipt shall be in full for all demands on this cargo or bill of lading.

In witness whereof the said master of said boat hath affirmed to two bills of lading, one marked "duplicate," of this tenor and date, one of which being accomplished, the other to stand void.

ARMOUR, PLANKINGTON & CO., *New York.*

7,900 bu. No. — red wheat, ex cargo schr. R. Hallaran. Freight to New York five (5) cents per bu.

Advanced charges, $200.00.

H. MORSE & CO.,
Per C. E. WOLFE.

(Seventy-nine hundred bushels.)

C. E. WAGER.

The freight charges and demurrage to the amount of $516.94 are payable by check to the order of the National Bank of the Republic, in New York, such check to be delivered to E. B. Brook & Co., who is the only party authorized to collect the same, whose receipts shall be in full for all demands therefor.

(New.) C. E. B. 28.

Printed across the face in red ink the word, "original."

Endorsed: Armour, Plankinton & Co., Whittock.

(Indorsed:) Libel *in personam.* Filed May 7, 1887.

7 *Warrant.*

UNITED STATES OF AMERICA, *Northern District of New York,* } *ss:*

The President of the United States of America, to the marshal of the northern district of New York, and to his deputy, whomsoever, Greeting:

Whereas a libel has been filed in the district court of the United States of America for the northern district of New York, on the 7th day of May, A. D. 1887, by The Providence Washington Insurance Company, of Providence, Rhode Island, and the Security Insurance Company, of New Haven, Connecticut, against Henry Morse and Alanson Morse, copartners, and Charles E. Wager, respondents, in a certain action, civil and maritime, for collision and damages alleged to be due the said libellants, amounting to nine thousand two hundred and eleven and seventy-five one-hundredths dollars, and praying that a monition may issue against the respondents pursuant to the rules and practice of this court.

[L. S.]

Now, therefore, you, the said marshal, are hereby jointly and severally empowered and strictly enjoined and commanded, that you cite and admonish Henry Morse and Alanson Morse, copartners, and Charles E. Wager, respondents, as aforesaid, if they shall be found within your district; that they be and appear before the judge

of the district court of the United States of America, for the northern district of New York, at the city of Utica, on the 31st day of May, 1887, if it be a court day, else on the court day next following, at ten o'clock in the forenoon, there to answer unto the said libel of said libellants, and to make their and each of their allegations in that behalf, and further to do and receive in this behalf as to justice shall appertain; and that you duly certify the aforesaid judge what you shall do in the premises, together with these presents.

Witness the Honorable Alfred C. Coxe, judge of the aforesaid court, at the city of Buffalo, this 7th day of May, in the year of our Lord, 1887.

Action for $9,211.75, and costs $100.

CHARLES B. GERMAIN, *Clerk.*

EDWARD D. McCARTHY,
Proctor for Libellants, 50 Wall Street, N. Y.

8 UNITED STATES OF AMERICA, } ss:
Northern District of New York, }

I hereby certify that on the 7th day of May, 1887, at Buffalo, I personally served the within warrant *in personum* on the within-named defendants, Henry Morse & Alanson Morse, by showing the same and delivering to and leaving with each of them a true copy thereof.

WALTER H. BUNN, *U. S. Marshal,*
By CORNELIUS DONOHUE, *Deputy.*

Endorsed: Warrant *in personum.* Continued for one week. Alias process may issue. May 31st, 1887. A. C. C. Continued till June 28, 1887. Alias process may issue. June 7th, 1887. A. C. C. Filed May 28th, 1887.

9 UNITED STATES OF AMERICA, } ss:
Northern District of New York, }

I hereby certify that on the 10th day of June, 1887, at Buffalo, N. Y., I personally served the within writ *in personum* on the within-named defendant, Charles E. Wager, by showing him the same and delivering to and leaving with Charles E. Wager a true copy thereof.

WALTER H. BUNN, *U. S. Marshal,*
By CORNELIUS DONOHUE, *Deputy.*

Endorsed: Alias warrant *in personum.* Filed June 10th, 1887.

10 *Answer of Respondents Morse.*

District Court of the United States, Northern District of New York.

The Providence Washington Insurance Company of Providence, Rhode Island, and The Security Insurance Company of New Haven, Connecticut, *against* Henry Morse and Alanson Morse, Copartners, and Charles E. Wager, Respondents.	In Admiralty. No. 3007.

To the Honorable Alfred C. Coxe, judge of the district court for the northern district of New York:

The respondents, Henry Morse and Alanson Morse, by their answer to the libel and complaint herein of the above-named
11 libellants, saving and reserving all exceptions and objections to said libel and complaint, for answer thereto, do allege and propound as follows:

First. That they are ignorant as to whether the libellants were foreign corporations, as alleged in the first article of said libel, but admit that said libellants were carrying on the business of insurance as in said article set forth.

Second. They admit the matter and things set forth in the second article of said libel, except this, that they deny that they were engaged in the business of carrying goods on the Erie canal, at the times in the libel mentioned.

Third. They say that the matters and facts in the third article of said libel are in many things untruly and falsely therein set forth, and they deny each and every allegation thereof, except as they hereinafter specifically admit the same. And they say that as to the matters and facts in said third article of said libel alleged, the truth is that on or about the 17th day of May, 1883, these respondents undertook and agreed with one William Meadows, of the city of Buffalo, to safely and properly cause to be carried from said city by the Erie canal and Hudson river, to the city of New York, seven thousand nine hundred bushels of wheat, consigned to the firm of Armour, Plankinton & Co., who were its owners, for the agreed price of five cents for each bushel as freight; that it was then and there agreed and understood between these respondents and said Meadows that those respondents should advance and pay certain back charges upon said wheat, amounting to about $200.00, and that they should be repaid the same upon the delivery of said wheat at New York city. That thereupon these respondents hired and employed the respondent herein, Charles E. Wager, to carry and transport said wheat by the said canal and river from
12 Buffalo, aforesaid to said city of New York, in and upon the canal-boat "William Worden," whereof said Wager then was the sole owner and master, for the freight aforesaid, and upon said Wager's agreement that these respondents should be repaid their

advances upon account of said back charges, together with such advances as these respondents might make to said Wager on account of said freight and cargo, and a commission of $19.75 to these respondents for procuring said cargo, out of said freight and charges upon said cargo, upon the arrival of said cargo at its said destination; that it was then and there agreed and understood by and between said Wager and these respondents that these respondents should procure said wheat to be insured upon said voyage from Buffalo to New York city for the benefit and protection of these respondents as carriers thereof and as creditors and advancers thereon and for the benefit of said Wager or carrier thereof, to protect these respondents and said Wager from all loss and damage which might be caused by any loss or damage to said cargo by perils of said voyage, and that said insurance should be assigned to said Armour, Plankinton & Co., as security for the safe carriage and delivery of said cargo as aforesaid, said Wager then and there agreeing to pay these respondents any and all premium of insurance which these respondents might pay for such insurance, out of said freight upon the delivery of said cargo at New York city. That thereupon said Meadows shipped said wheat upon said canal-boat "William Worden," and these respondents and said Wager signed a bill of lading therefor and delivered the same to said Meadows, and that thereupon said Wager signed and delivered to these respondents another and further bill of lading for said wheat, in the usual form. That

13 the said bill of lading signed by these respondents and said Wager, is substantially the same as the schedule annexed to said libel and therein marked "A," but is dated May 17, 1883, and not May 7, 1883. That thereupon said boat "Worden" departed from said Buffalo bound to said city of New York with said cargo on board in tow of the steam canal-boat "Sydney," whereof said Wager was master, the stern of said "Worden" being fastened during a part of the voyage to the bow of said "Sydney" and being pushed by the latter, the said "Worden" having no masts, sails or any motive power on board but not being made a part of said "Sydney."

Fourth. These respondents admit the allegations of the fourth article of said libel.

Fifth. These respondents admit the allegations of the fifth article of said libel, except this, that these respondents say that the insurance in said article mentioned was effected May 17, 1883, and not May 7, 1883; and except this, that these respondents deny that in or by said insurance the libellants did insure and agree to indemnify against loss the aforesaid Armour, Plankinton & Co.; and except this, that these respondents deny that the libellants became subrogated to all, and any of the rights, claims and demands of the said Armour, Plankinton & Co.; and except this, that these respondents deny that the libellants have paid said Armour, Plankinton & Co., any moneys which they or either of them were liable or compellable to pay under said policy; and except this, that these respondents deny that said insurance covered the interest of these respondents, as the creditors and advancers only; and these respondents say that

said insurance was taken out, procured, effected and paid for by these respondents under and pursuant to their said agreement with said Wager in the third article of this answer set forth; and that in and by the policy and certificate in said fifth article of said
14 libel mentioned the libellants did insure and agree to indemnify and hold harmless against the perils of said voyage, on said cargo of wheat, these respondents as carriers, creditors and advancers and said Wager as carrier, and that said insurance was transferred to said Armour, Plankinton & Co. by these respondents as security and pursuant to said agreement between these respondents and said Wager set forth in the third article of this answer, as will more fully appear from said policy and certificate with the endorsements thereon, proof whereof these respondents pray may be made.

Sixth. That all and singular the premises are true.

Wherefore these respondents pray that the libel herein may be dismissed as to them, that the libellants may be condemned to pay the costs of these respondents, and that these respondents may have such other relief in the premises as to the court may seem just.

HENRY MORSE.
ALANSON MORSE.

CLINTON & CLARK,
Proctors for Resp'ts Henry Morse and Alanson Morse.

STATE OF NEW YORK, } ss:
Erie County, }

Henry Morse and Alanson Morse, being each by me duly sworn, doth each for himself say, that he is one of the respondents in the above-entitled cause; that he has heard read the foregoing answer and knows its contents and that the same is true to his own knowledge, except the matters stated to be alleged upon information and belief, and that as to such matters he believes it to be true.

HENRY MORSE.
ALANSON MORSE.

Subscribed and sworn to before me May 30th, 1887.

JOHN OTTO,
[L. S.] *Notary Public, Erie County, New York.*

(Indorsed:) Answer of respondents, Henry Morse and Alanson Morse. Filed May 31, 1887.

15 *Answer of Respondent Wager.*

District Court of the United States, Northern District of New York.

(Title.)

To the Honorable Alfred C. Coxe, judge of the district court of the United States for the northern district of New York:

The respondent, Charles E. Wager, by this his amended answer, separate and apart for himself, to the libel and complaint herein of

the above named libellants, saving and reserving all exceptions and objections to said libel and complaint, alleges and respectfully shows to this honorable court as follows:

First. This respondent admits the allegations in the first article of the libel and complaint contained.

Second. This respondent admits the allegations in the second article of the libel and complaint contained, except that he has no knowledge or information sufficient to form a belief as to whether the co-respondents, Henry and Alanson Morse, are directly engaged in the business of carrying goods on the Erie canal, and leaves the libellants to make such proof thereof as they by their counsel may be advised.

Third. This respondent avers that the matters and facts in the third article of said libel and complaint are in many things untruly and falsely therein set forth, and he denies each and every allegation thereof, except as he hereinafter specifically admits the same. And he says that as to the matters and facts in said third article of said libel alleged, the truth is, that on or about the 17th day of May, 1883, this respondent applied to said co-respondents, Henry and Alanson Morse,
16 to procure for him a cargo of grain to be transported on board the canal-boat "William Worden," from Buffalo to the port of New York. That thereupon said co-respondents, Henry and Alanson Morse, through their agents and servants, applied, as the agent of this respondent, to William Meadows for a cargo of grain to be transported by this respondent in his said boat, "William Worden," from Buffalo to New York aforesaid. That thereupon said William Meadows agreed to and did furnish a cargo of seven thousand nine hundred bushels of wheat, to be transported as aforesaid in this respondent's said boat for the agreed price of five cents for each bushel as freight. That thereupon this respondent agreed with said William Meadows and with the said co-respondents to carry and transport said wheat by the Erie canal and Hudson river from Buffalo aforesaid to the city of New York, in and upon the said canal-boat, "William Worden," whereof this respondent was then sole owner and master, for the freight aforesaid. That said co-respondents, at the request of said William Meadows and this respondent, advanced about two hundred dollars to pay back or lake charges on said cargo of grain, and also advanced this respondent nearly all his freight on said cargo. That said Meadows and this respondent agreed that said co-respondents should be repaid said advances upon account of said back charges, together with said advances made to this respondent on account of said freight. And this respondent further agreed with said co-respondents that he would allow said co-respondents a commission of nineteen $\frac{75}{100}$ dollars, for procuring said cargo for this respondent, out of said freight of five cents for each bushel, upon the arrival of said cargo at its destination. And for said commission it was further then and there agreed and understood between this respondent and said co-respondents that
17 said co-respondents should procure said cargo of grain to be insured upon said voyage from Buffalo to New York city, for the benefit and protection of said co-respondents as carriers

thereof and as creditors and advancers thereon, and for the benefit of this respondent as carrier thereof, to protect this respondent and said co-respondents from all loss and damage which might be caused by any loss or damage to said cargo by perils of said voyage, and that said insurance should be assigned to the consignee of said cargo as security for the safe carriage and delivery of said cargo as aforesaid That this respondent then and there agreed to pay said co-respondents any and all premiums of insurance which said co-respondents might pay for such insurance out of said freight, upon the delivery of said cargo at New York city. That thereupon said Meadows shipped said cargo of grain upon said canal-boat, "William Worden," and this respondent and said co-respondents signed a bill of lading therefor and delivered the same to said Meadows, a copy of which is attached to and set forth in the libel and complaint herein, and that thereupon this respondent signed and delivered to said co-respondents another and further bill of lading for said cargo of grain, in the usual form, which this respondent begs leave to produce on the trial of this suit. That said last bill of lading mentioned is substantially the same as the copy of the bill of lading annexed to the libel herein, and in said libel marked "A." That thereupon this respondent departed from Buffalo aforesaid with said boat "Worden," loaded with said cargo, bound for the city of New York, in tow of the steam canal-boat "Sydney," whereof this respondent was sole owner and master, the stern of said boat "Worden" being fastened to the bow of said steam canal-boat "Sydney," and being pushed by the latter, the said "Worden" having
18 no masts, sails or any other motive power on board, but not being made a part of the "Sydney."

Fourth. This respondent admits the allegations in the fourth article of the libel and complaint contained.

Fifth. This respondent admits the allegations contained in the fifth article of said libel and complaint, except that this respondent says that the insurance in said article mentioned was effected May 17th, 1883, and not May 7th, 1883, and except that this respondent denies that in or by said insurance the libellants did insure and agree to indemnify against loss the aforesaid consignee, Armour, Plankinton & Co., only and alone, but alleges, on the contrary, the libellants did, by their insurance policies and certificates, which this respondent begs leave to refer to and introduce on the trial of this suit, insure and agree to indemnify and hold harmless said consignee, Armour, Plankinton & Co., as owners of said cargo of grain, and the co-respondents, H. Morse & Co., as advancers thereupon and carriers thereof and this respondent as carrier thereof, against the perils of said voyage, on said cargo of grain shipped as aforesaid on said boat "William Worden," and except this respondent denies that the libellants upon payment of said loss became subrogated to all and any rights, claims and demands of the said consignee, Armour, Plankinton & Co., or of any other person or persons as against this respondent or the co-respondents herein, but, on the contrary, this respondent alleges that the payment of said loss by the libellants to Armour, Plankinton & Co. and H. Morse & Co., under the terms

and covenants in said policies and certificate of insurance, accrued to and was for the benefit of all the parties insured under the terms and covenants in said policies and certificate of insurance, to
19 wit: Armour, Plankinton & Co. as owners, H. Morse & Co. as advancers and carriers, and Charles E. Wager, this respondent, as carrier and owner and master of the canal-boat "William Worden," and this respondent says further that said insurance was taken out, procured, effected and paid for by this respondent under and pursuant to his said agreement with said co-respondents, in the third article of this answer set forth, and for the benefit of the persons as above set forth and not otherwise.

Sixth. That this respondent denies each and every the other allegations in the said libel and complaint contained not hereinbefore admitted or denied.

Seventh. That on or about the 23d day of July, 1883, the libellants herein commenced a suit on the same cause of action as that set forth in the libel herein, by the filing of a libel *in rem* in the district court of the United States for the southern district of New York, against the steam canal-boat "Sydney" and her consort the canal-boat "William Worden," of which vessels the respondent, Charles E. Wager, herein was then the owner; that said Charles E. Wager duly appeared in said suit *in rem*, and gave a stipulation for the agreed value of the "William Worden," and that the "Sydney" was duly sold by consent under process issued upon said libel, and the proceeds of sale, less expenses, were paid into said court.

That issue as to both said vessels was duly joined in said suit by said Charles E. Wager as claimant, and such proceedings were thereupon had, after a trial upon the issues raised by the pleadings in said suit, that said district court did, on or about the 18th day of February, 1885, duly make and enter a final decree, dismissing the said libel on the merits, with $340.92 costs as taxed. That
20 thereupon the said libellants appealed from said decree to the circuit court of the United States for the southern district of New York (second circuit), which last-named court, after a hearing upon said appeal, made and entered a decree, on or about the 30th day of March, 1887, which decree in all things reversed the said decree of the district court, and awarded the said libellants $6,175.89 damages, together with $656.28 costs as taxed, and $1,420.30 interest, or $8,252.47 in all. That on or about the 18th day of May, 1887, an appeal from said final decree of the said circuit court, was duly allowed to the Supreme Court of the United States by Hon. Samuel Blatchford, one of the associate justices of said United States Supreme Court, and thereupon and on or about the said 18th day of May, 1887, the said Charles E. Wager duly appealed from said final decree of said circuit court to the said United States Supreme Court, on which appeal said Wager gave the bond as required by rule 29 of the United States Supreme Court rules, in the amount and form fixed and approved by said Hon. Samuel Blatchford, which justice thereupon endorsed on said bond a supersedeas, or stay of all proceedings on the part of said libellants to enforce the collection of said decree, pending the final determination of said appeal. That

the said appeal has by said Wager been perfected in all things; that the record on said appeal has been duly transmitted to the United States Supreme Court by the said circuit court, all of which occurred before the commencement of this suit, and that said appeal is still pending undetermined in said United States Supreme Court, which prior suit and pending appeal this respondent hereby pleads in bar and abatement of this action.

Eighth. That all and singular the premises are true.

Wherefore, this respondent prays that the libel herein may
21 be dismissed as to him and that the libellants may be condemned to pay the costs of this respondent, and that this respondent may have such other and further relief in the premises as to this court may seem just.

CHARLES E. WAGER,
By J. A. HYLAND, *Att'y.*

HYLAND & ZABRISKIE,
Proctors for Respondent, Charles E. Wager.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

J. A. Hyland, being duly sworn, says that he has read the foregoing answer and knows its contents, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true. That the source of deponent's information is from statement made to him by H. Morse, one of the co-respondents herein, and Charles E. Wager, this respondent, and from a personal examination of the policy and certificate of insurance referred to in above answer, and from the reading of the bills of lading in the answer referred to.

That the reason this answer is verified by deponent is that Charles E. Wager is now at Buffalo, N. Y., and without this district.

J. A. HYLAND.

Sworn to before me this 28th day of February, 1888.

DANIEL J. AUGUSTINE,
[L. S.] *Notary Public, N. Y. Co.*

(Indorsed:) Amended answer of respondent, Charles E. Wager.

22 *Final Decree of District Court.*

At a session of the district court of the United States of America for the northern district of New York, held at the city of Utica, on the 13th day of August, A. D. 1888.

Present: Hon. Alfred C. Coxe, district judge.

THE PROVIDENCE WASHINGTON INSURANCE COMPANY of Providence, R. I., and The Security Insurance Company of New Haven, Conn., Libellants,
against
HENRY MORSE, ALANSON MORSE, and CHARLES E. WAGER, Resp'ts.
} No. 3007.

This cause having been heard on the pleadings and proof, and having been argued and submitted by the advocates for the respective parties, due deliberation being had in the premises, it is pronounced, decreed and declared, and this court, by virtue of the power and authority therein vested, doth hereby pronounce, decree and declare that the libellants recover herein against Henry Morse and Alanson Morse, respondents, the sum of four thousand five hundred dollars, the amount as stipulated by the proctors for said Morses on the trial hereof, and that the libellants do recover as against Charles E. Wager, respondent, the sum of six thousand one hundred and seventy-five dollars, together with the costs of said libellants against said respondents, as taxed in this court, amounting to one hundred and seventeen dollars and sixteen cents, and that libellants have execution for said amounts for the satisfaction of the sum of $6,292.16, that being the full amount which said libellants are entitled to recover herein.

23 And it is further ordered, adjudged and decreed that within ten days from the entry of this decree, the said Henry Morse, Alanson Morse and Charles E. Wager, pay into the registry of this court the sum of four thousand five hundred dollars, together with the said taxed costs, and that within the said time the said Charles E. Wager pay into the registry of this court the further sum of one thousand six hundred and seventy-five dollars, and judgment for the said respective sums is hereby ordered against the said respective named respondents, to wit, $4,617.16 against all the respondents, jointly and severally, and $1,675 against the defendant Wager, severally.

And it is further ordered that if the said named respondents shall fail to make the said payments as hereinbefore directed, execution do then forthwith issue against them.

ALFRED C. COXE.

(Indorsed:) Final decree. Filed Aug. 17, 1888.

24 *Final Decree of Circuit Court.*

At a stated term of the circuit court of the United States for the northern district of New York, held at the United States court-rooms, in the city of Albany, on this 15th day of January, 1889.

Present: Hon. William J. Wallace, circuit judge.

THE PROVIDENCE WASHINGTON INSURANCE COMPANY of Providence, Rhode Island, and The Security Insurance Company of New Haven, Connecticut, Libellants and Appellees,
versus
HENRY MORSE, ALANSON MORSE, and CHARLES E. WAGER, Respondents and Appellants.

Appeal No. 176.

The above-entitled cause having been duly heard on the appeal of the above-named respondents and appellants from the final decree of the district court of the United States for the northern district of New York, bearing date the 13th day of August, 1888, and entered in the office of the clerk of said district court on the 17th day of August, 1888, on the pleadings and proofs in said district court; and said appeal having been argued by the advocates for the respective parties, and due deliberation being had in the
25 premises in accordance with the findings and conclusions of the court herein duly filed with the clerk of this court, it is now hereby—

Ordered, adjudged, and decreed by the court that as to the respondents and appellants Henry Morse and Alanson Morse the decree of the said district court herein be reversed and the libel herein of the said libellants and appellees be, and the same is hereby, dismissed upon the merits, and that the said libellants and appellees take nothing thereby against said Henry Morse and Alanson Morse; and it is further adjudged and decreed that said appellants, Henry Morse and Alanson Morse, do recover of and from said libellants, The Providence Washington Insurance Company of Providence, Rhode Island, and The Security Insurance Company of New Haven, Connecticut, the sum of two hundred twenty-six and $\frac{57}{100}$ (226.57) dollars, their costs and disbursements in the district and circuit courts as taxed.

And it is further hereby ordered, adjudged, and decreed that the decree so appealed from be, and the same hereby is, affirmed with costs of both courts as against the appellant and respondent Charles E. Wager, and that the said libellants and appellees, The Providence Washington Insurance Company of Providence, Rhode Island, and The Security Insurance Company of New Haven, Connecticut, do recover herein of and have judgment against said appellant, Charles E. Wager, for the sum of six thousand one hundred seventy-five and $\frac{89}{100}$ (6,175.89) dollars, together with the interest thereon from the 28th day of May, 1883, amounting to the sum of two thousand one hundred fifty-three and $\frac{32}{100}$ (2,153.32) dollars, to-
26 gether amounting to the sum of eight thousand three hundred twenty-nine and $\frac{21}{100}$ (7,329.21) dollars, and, together with the sum of one hundred seventeen and $\frac{16}{100}$ (117.16) dollars, their costs as taxed in the district court, amounting in the aggregate to the sum of eight thousand four hundred forty-six and thirty-seven hundreths (8,446.37) dollars; and Alanson Morse and John Fero having become sureties for said Charles E. Wager for all costs which should be awarded against him, the said Charles E. Wager, as such appel-

lant herein if he should fail to make his appeal good, it is further adjudged and decreed that said libellants and appellees do recover their costs in the circuit court, taxed at seventy-five and thirty one-hundredths (75.30) dollars, of said Charles E. Wager, and that a summary judgment for said amount of taxed costs in the circuit court be, and the same is hereby, entered against said Alanson Morse and John Fero, sureties and stipulators for the costs as aforesaid.

And it is further ordered that, unless an appeal be taken from this decree within twenty days from the entry thereof and service of a copy of the same on the proctors for the libellants and appellees and of the respondent Charles E. Wager, the said Henry Morse and Alanson Morse have execution according to law and the rules and practice of the court to enforce the satisfaction of their costs aforesaid, and the libellants have execution against said Charles E. Wager for said amounts decree- to be paid by him as aforesaid and
27 against said Wager and his said sureties and stipulators for said costs of this court taxed as aforesaid.

WM. J. WALLACE.

We hereby waive notice of settlement of the foregoing decree. M'ch 28, '89.

HYLAND & ZABRISKIE,
Proc's for Chas. E. Wager.
EDW'D D. McCARTHY,
Proctor for Libellants.

M'ch 29, '89.

Indorsed: Final decree. Filed Apr. 18, 1889. W. S. Doolittle, clerk.

28 *Bill of Exceptions.*

Circuit Court of the United States, Northern District of New York.

THE PROVIDENCE WASHINGTON INSURANCE COMPANY OF PROVIDENCE, RHODE ISLAND, and The Security Insurance Company of New Haven, Conn., Libellants and Appellants,
vs.
CHARLES E. WAGER, Respondent and Appellant, Impleaded with HENRY and ALANSON MORSE, Respondents and Appellees.

This cause came on for trial before the Honorable William J. Wallace, circuit judge, at a term of the circuit court of the United States in and for the northern district of New York, in the second circuit, on the 15th and 16th days of January, 1889, on appeal by the respondents, Henry Morse and Alanson Morse and Charles E. Wager, from the final decree of the district court of the United States for the northern district of New York in favor of the libellants. Counsel for the libellants read the libel, and counsel for the

several respondents read the answers as the same were contained in the apostles transmitted from said district court to said circuit court. Counsel for the libellants then put in evidence the testimony taken and depositions and exhibits read on behalf of the libellants in the district court as the same were contained in the apostles, in-
29 cluding the testimony and exhibits in the Sydney suit, it being considered that the counsel for libellants read the direct examination, and that counsel for respondents read the cross-examination.

United States District Court, Northern District of New York.

THE PROVIDENCE WASHINGTON INSURANCE COMPANY and ano.
against
CHARLES E. WAGER, ALANSON MORSE, and HENRY MORSE.
} Stipulation.

Any party to this action may read on the trial of its issues from the apostles in the case of The Providence Washington Insurance Company and ano., these libellants, against the steam canal-boat "Sydney" and the canal-boat "William Worden:"

Provided, however, that objections may be taken to any testimony which would be incompetent or irrelevant if offered as primary.

That uncertified copies of the papers referred to in the seventh paragraph of the proposed amended answer may be used in evidence on the trial of this action, case to proceed to trial on March 13, 1888, at Utica, and that said proposed amended answer of Charles E. Wager be filed herein in lieu of his original answer heretofore filed.

30 It is further stipulated that any party may read the evidence or any part thereof taken in said cause against the canal-boats "Sydney" and "William Worden" in the circuit court, subject to objection as aforesaid.

Dated February 29, 1888.

HYLAND & ZABRISKIE,
Proctors for Resp'd't Charles E. Wager.
EDWARD D. McCARTHY,
Proctor for Libellants.
CLINTON & CLARK,
Proctors for Henry and Alanson Morse, Respondents.

Libellants' counsel also offers in evidence the final decree of the U. S. circuit court for the southern district of New York in the case of The Providence Washington Insurance Company of Providence, R. I., and The Security Insurance Company of New Haven, Conn. (libellants herein), against the "Sydney" and "Worden."

31 At a stated term of the circuit court of the United States of America for the southern district of New York, held at the

United States court-rooms, in the city of New York, on the 28th day of March, 1887.

Present: The Honorable William J. Wallace, circuit judge.

THE PROVIDENCE WASHINGTON INSURANCE COMPANY of Providence, Rhode Island, and The Security Insurance Company of New Haven, Connecticut, Libellants and Appellants,

vs.

THE STEAM CANAL-BOAT "SYDNEY," HER ENGINES, &c., and the Canal-boat "William Worden," Her Tackle, Apparel, &c., Whereof Charles E. Wager is Claimant and Appellee.

} Decree.

This cause having been heard upon the appeal of the libellants from the decree of the district court of the United States for the southern district of New York upon the pleadings and proofs in said district court and the additional testimony taken in this court on said appeal, and having been argued and submitted by the advocates of the respective parties and due deliberation being had in the premises—

It is now ordered, adjudged, and decreed by the court that the said decree of the district court be, and the same is hereby, in all things reversed with costs in both courts, and that the
32 libellants recover in this action against the steam canal-boat "Sydney," her engines, &c., and the canal-boat "William Worden," her tackle, apparel, and furniture, the sum of six thousand one hundred and seventy-five $\frac{89}{100}$ dollars (6,175.89), with interest thereon from May 18th, 1883, to the date of this decree, amounting to the sum of one thousand four hundred and twenty $\frac{30}{100}$ dollars ($1,420.30), together with the sum of six hundred and fifty-six $\frac{28}{100}$ dollars ($656.28) costs, as taxed in this court and in the said district court, amounting in the aggregate to the sum of eight thousand two hundred and fifty-two $\frac{47}{100}$ dollars ($8,252.47), and that the said steam canal-boat "Sydney," her engines, &c., and the said canal-boat "William Worden," her tackle, apparel, and furniture, be condemned therefor.

And whereas, on the 25th day of July, 1883, the said steam canal-boat "Sydney," then being in the custody of the marshal of the United States district court, southern district of New York, pursuant to process duly issued in behalf of the libellants in this action, was, by order of said district court, duly sold by said marshal at public sale, and the proceeds of such sale, to wit, the sum of $2,100, was, by the said marshal, paid into the registry of the court;

And whereas the value of said canal-boat "William Worden," after process duly issued against her, was fixed by consent at the sum of $1,000, for which the usual stipulation for value was duly given: Now, therefore—

It is further ordered, adjudged, and decreed that the proceeds of the sale of the said steam canal-boat "Sydney," together with
33 the interest thereon which has accrued since the same was deposited in the registry of the court, be paid over to the li-

bellants herein or to their proctor, Edward D. McCarthy, Esq. (after first deducting the fees of the officers of the court), towards the satisfaction of this decree, unless an appeal be allowed, taken, and perfected within forty-five (45) days from the date of this decree.

It is further ordered, adjudged, and decreed that, unless such appeal be allowed and perfected within said time, the stipulators for costs and for the value of the canal-boat "William Worden," filed on behalf of the claimant in this action, cause the engagement of their stipulations to be performed, or to show cause before this honorable court within four days after the expiration of said date of appeal (and after the service of a copy of this decree upon the proctors for said claimant), or upon the first day of jurisdiction thereafter, why summary judgments should not be entered agains- them and libellants and appellees have execution towards the satisfaction of this decree.

WILLIAM J. WALLACE.

Counsel for the respondents then put in evidence the testimony taken and the depositions read on behalf of the respondents in the district court as the same were mentioned in the apostles, it being considered that the counsel for respondents read the direct examination and counsel for the libellants read the cross-examination.

Here the testimony was closed.

34 Libellants' proctor offers to give credit for the amount that might be recovered in the suit *in rem* and take a decree for the residue.

The proctor for the respondent Wager objected on the ground that an appeal had been taken in the suit *in rem* to the Supreme Court of the United States, and insisted that if the decree should be for the libellants, then that it be entered for the amount claimed in the libel without any deduction.

Thereupon, all parties consenting, the court announced that a decree would be entered against the respondents, or any one of them, for the amount of the loss, to wit, $6,175.89, with interest from May 28th, 1883, provided the decree should be given in favor of the libellants at all, it being admitted by all the parties hereto that nothing has been realized from the decree *in rem* against the steam canal-boat "Sydney" and the canal-boat "Worden," and that an appeal has been taken to the Supreme Court of the United States from the said decree *in rem*, which appeal is now pending.

The counsel for the respondent Wager, at the trial of this case before said circuit court, submitted to said circuit judge the following proposed findings of fact and conclusions of law:

35 Circuit Court of the United States, Northern District of New York.

THE PROVIDENCE WASHINGTON INSURANCE COMPANY OF PROVIDENCE, Rhode Island, and The Security Insurance Company of New Haven, Conn., Libellants and Appellees,
vs.
HENRY and ALANSON MORSE, Copartners, and CHARLES E. WAGER, Respondents and Appellants.

The court is respectfully requested, on behalf of the co-respondent, Charles E. Wager, to make the following—

Findings of Fact.

I.

That during the month of May, 1883, the co-respondent Charles E. Wager was master and owner of the canal-boat "William Worden," and H. Morse & Co. were doing business at Buffalo, as intermediaries between boatmen and shippers of cargoes in procuring cargoes to be shipped for a commission, and at the same time and
36 place William Meadows was engaged in the business of shipping grain on canal-boats from Buffalo to New York.

II.

That said Charles E. Wager, having said boat, "William Worden," in Buffalo, ready to engage in transporting cargo from Buffalo to New York, on or before the 17th day of May, 1883, applied to H. Morse & Co. and requested them to procure for him a cargo to be shipped from Buffalo to New York. That thereupon Alanson Morse, a member of the firm of H. Morse & Co., took said Charles E. Wager to the office of W. Meadows, at Buffalo, and asked said Meadows if he had a cargo of grain to be shipped to New York. That said Meadows told Mr. Morse that he had a cargo of five-cent wheat which he would give him to be shipped, which said Morse then and there accepted to be shipped on board the said Wager's boat "Worden." That thereupon and before said cargo of grain was put on board the boat "Worden," the said Charles E. Wager requested H. Morse & Co. to get the cargo insured for his benefit, which said Morse & Co. agreed to do, and thereupon immediately applied to the libellants, The Providence Washington Insurance Company and The Security Insurance Company, to insure said cargo for their benefit and the benefit of Charles E. Wager, as advancers and common carriers. That thereupon the said insurance companies, the libellants herein, issued to H. Morse & Co. a certificate of insurance, in which the said companies agreed to insure on account of H. Morse & Co., for whom it might concern, as owner, advancer or common carrier, a cargo of grain of the value of $9,875 while *in transitu* from Buffalo to New York inboard boat "William Worden;" and that thereafter and before the loss occurred for which this suit is brought, said Morse & Co. paid the said insurance companies, the libellants herein,

the premium agreed to be paid for said insurance. That on receipt of said insurance certificate H. Morse & Co. endorsed the same
37 in blank and delivered it to W. Meadows, whereupon said Meadows gave an order upon the grain storehouse to H. Morse & Co. to deliver the cargo of grain to the boat "William Worden."

III.

That said order for said cargo was given by said H. Morse & Co. to the co-respondent Charles E. Wager, who presented the same for the cargo of grain, and thereupon the said cargo of grain was delivered inboard the said boat "William Worden." Immediately thereafter H. Morse & Co. and Charles E. Wager, the respondents, executed and delivered to said W. Meadows a bill of lading or affreightment contract, in which they agreed with said Meadows to safely transport said cargo of grain from Buffalo to New York and deliver the same to the consignees thereof, Armour, Plankinton & Co., for five cents per bushel.

IV.

That before said cargo of grain was delivered to said boat "William Worden," H. Morse & Co. paid to W. Meadows $200, to pay the freight and charges then due upon said cargo of grain for transporting the same from Chicago to Buffalo on the lakes, and also advanced to Charles E. Wager his freight on said cargo to the amount of $319.44. That thereupon the co-respondent Charles E. Wager executed and delivered to H. Morse & Co. a sub-bill of lading or affreightment contract in which he agreed with said H. Morse & Co. to transport for them the said cargo of wheat from Buffalo to New York on the boat "William Worden" for the same rate of freight, to wit, five cents per bushel.

38 V.

That thereafter on the 29th day of May, 1883, said cargo was lost, while *in transitu*, in the Hudson river, by reason of said boat "Worden" having grounded on an island known as Esopus island. That thereupon the said insurance companies, the libellants herein, on the presentation of said certificate of insurance by Armour, Plankinton & Co., who held said certificate of insurance and the said original bill of lading or affreightment contract, paid to said Armour, Plankinton & Co. and H. Morse & Co. said loss under the terms and conditions of said policy of insurance, paying thereof to H. Morse & Co. $670, being the amount of money which H. Morse & Co. had advanced to pay for transporting said grain from Chicago to Buffalo, and the freight which H. Morse & Co. had advanced to co-respondent, Charles E. Wager, out of which was paid the insurance premium and other charges for loading and transporting said cargo.

Conclusions of Law.

First.

That under said bill of lading or affreightment contract made by H. Morse & Co. and Charles E. Wager with W. Meadows, in which H. Morse & Co. and Charles E. Wager agreed to transport said cargo of grain from Buffalo to New York inboard the canal-boat "William Worden" for five cents per bushel, H. Morse & Co. and Charles E. Wager became and were common carriers, and as common carriers had an insurable interest in said cargo to its full value.

Second.

That under the insurance contract, which is found in the running or open cargo policy, together with the certificate of insur-
39 ance, the libellants, The Providence Washington Insurance Company and The Security Insurance Company, insured H. Morse & Co. and Charles E. Wager, as common carriers and advancers, against loss on said cargo of wheat while *in transitu* inboard the boat "William Worden" from Buffalo to New York.

Third.

That Armour, Plankinton & Co. were not parties to the insurance contract herein, and were not insured by the libellants herein as owners of the said cargo.

Fourth.

That payment of said loss by the libellants to Armour, Plankinton & Co. and H. Morse & Co., on the presentation of the certificate of insurance by Armour, Plankinton & Co. to the libellants, was payment for and in behalf of the respondents, H. Morse & Co. and Charles E. Wager, and for their benefit.

Fifth.

That the libellants herein, having paid said loss under the said insurance policy to Armour, Plankinton & Co. for the benefit of H. Morse & Co. and Charles E. Wager, the respondents, as moneys which the libellants had set apart to indemnify said H. Morse & Co. and Charles E. Wager against loss as common carriers and advancers, are estopped from bringing suit to recover back said money.

Sixth.

That the libel and complaint herein should be dismissed as against respondents Charles E. Wager and H. Morse & Co., with costs of this court and the court below to be taxed.

HYLAND & ZABRISKIE,
Proctors for Charles E. Wager.

40 The circuit judge did not pass upon such findings except as found in the findings made by him and hereinafter set forth, to which the respondent Wager duly filed and served the following exceptions:

Circuit Court of the United States, Northern District of New York.

THE PROVIDENCE WASHINGTON INSURANCE COMPANY OF PROVIDENCE, Rhode Island, and The Security Insurance Company of New Haven, Conn., Libellants and Appellants,
vs.
CHARLES E. WAGER, Respondent and Appellant, Impleaded with HENRY and ALANSON MORSE, Respondents and Appellees.

SIRS: Please take notice that the respondent Wager hereby excepts to the refusal of the circuit court to pass upon his proposed findings of fact and conclusions of law submitted to the said circuit court on the trial of this action on appeal, and separately and severally excepts to the court's refusal to pass upon or find his first, second, third, fourth, and fifth proposed findings of fact and first, second, third, fourth, fifth, and sixth proposed conclusions of law.

41 Dated N. Y. city, June 4th, 1889.

Yours, &c., HYLAND & ZABRISKIE,
Proctors for Respondent Charles E. Wager,
No. 45 Broadway, New York City.

To E. D. McCarthy, Esq., proctors for libellants; Messrs. Clinton & Clark, proctors for respondents Henry and Alanson Morse, and W. S. Doolittle, Esq., clerk of the above-named court.

42 All the evidence given on the trial by all the parties hereto, upon which the proposed findings of fact of Wager were based, is as follows:

ARTHUR D. BISSELL, a witness, called and sworn for the respondents Morse, and examined by Mr. CLINTON, testified as follows:

I reside in Buffalo. I am engaged in the transportation business Have been so engaged to a certain extent since 1867. I refer to canal transportation, taking cargoes on my own boats, and as a broker. I am acquainted with the method of doing business there at Buffalo, taking insurance, and so forth.

Q. What is the custom on the part of the person who takes the cargo as to getting the insurance?

Mr. MCCARTHY: I object on the ground that the termination of the question as to who was insured is one of contract evidence to be determined by the testimony of Morse, Meadows and on the record.

Objection overruled.

43 A. It is the custom on the part of the scalper to get the cargo insured, irrespective of whether he is requested to

do so or not, to secure himself from loss under the bill of lading. The time was when the bill of lading was sufficient security. It was not necessary to have the collateral security of the certificate of insurance. This was before 1867. Three men are involved, the boatman, the middleman and the scalper.

Mr. McCARTHY: I object. That custom will not avail unless both parties knew of it.

Objection overruled.

The WITNESS (continues): The way these transactions were had were that the middleman procures a cargo from the shipper, and the question that is to be decided as between the middleman and the shipper is the question of rate. If they agree on the rate of freight, the contract as between the shipper and the broker is completed.

By Mr. CLINTON:

Q. Then he gets an order?

A. He gets an order for his cargo, and immediately goes to his office where he finds the captain of the boat who gives him that order and immediately has the insurance of the cargo entered upon his running policy.

Q. Now, in regard to obtaining these insurances, what has been the custom of the business since they have come to taking out insurances to protect the middleman in regard to transferring those policies to the shippers?

A. The insurance certificate under the application is issued to the middleman, who then endorses it and delivers it with the bill of lading to the shipper.

44 Q. For what purpose is the insurance certificate delivered to the shipper?

A. The insurance certificate is delivered to the shipper as collateral security of the bill of lading.

Q. And the liability of the carrier?

A. The carrier considers himself protected to the amount of the insurance certificate.

Q. How long, Mr. Bissell, to your knowledge, has that been done in the conducting of that business?

A. It was the course of business in the year 1867, when I went into that business, and it has been the same ever since.

Q. Under that custom of the business, as you have stated it, assuming that the shipper and the middleman agree upon the cargo and the rate of freight, and that that is all, would the business, as you understand it, nothing else being said, be conducted in the manner that you have last stated?

A. Yes, sir.

By Mr. McCARTHY:

Q. You are assuming a mere case here?

A. I am simply giving the testimony of the business as I have found it during my experience.

By Mr. CLINTON:

Q. You know how you did the business and how the other scalpers or middlemen did the business?

A. I think I do. I certainly know how I did my own. I did my business the same as the others. I never knew of any other method. I never heard of any. The middleman in doing the business in this way takes a bill of lading from the boatman, the carrier, and in clearing the boat they always give the captain a bill of lading on which they put the items included in the money advanced
45 to him. The insurance premium is charged to the captain, taken out of his freight, and by the middleman paid for the captain to the insurance company.

By Mr. MCCARTHY:

Q. Do you know, in this case, that the insurance premium was a lien, which was on the cargo, and paid out of it when it arrived in New York?

A. I cannot say how it was done in this particular case. I know how it was generally done.

By Mr. HYLAND: Do you know what the open policy in this case was?

A. The open policies were uniform. I have not read this particular open policy in this case, and I have not read the certificate in this case. I have not read the abandonment in this case made by the owners to the insurance company, and I have not read the abandonment made by the owner Morse to the insurance company.

Q. Did you not testify on the trial in New York against the Sydney and the Worden? Are you the Bissell?

A. I am the Bissell that was there. I have done business with different insurance companies there in Buffalo while I have been in business, and I have personally received from insurance companies open policies for the season. It was a practice with me whenever a cargo was insured to make application to the company and receive a certificate. This open policy was a season policy, and I applied for this insurance whenever I had a captain who had taken a cargo through me.

Q. Have you done your business of insuring cargoes in the same manner in which H. Morse & Company have done their business?

A. I presume the custom is uniform. I never supposed
46 there was any difference in the methods adopted or in use by any of the scalpers in Buffalo in insuring cargoes on the Erie canal. The insurance companies calculated to do their business alike.

Q. What is the custom in Buffalo with reference to insuring cargoes on canal-boats?

A. In the spring of the year, before business opens, the various insurance companies make out their open insurance policies and attach them to books, with the names of the various scalpers on the outside, and then distribute them to the various offices for use during the season. The policies are uniform, and the books are uniform

with each company. That has been so during my business experience, twenty years.

Q. Now, under that system, when you make application for insurance for a single cargo or any other scalper, for whom does he act under your custom?

Mr. McCARTHY: Objected to.

The COURT (Judge Coxe): I should say that that was a question of law, but in view of the facts in this case he may state what he does.

By Mr. HYLAND:

Q. State whom you see and what you do in reference to insuring under that system.

A. I make the application to the insurance company and receive a certificate, at which time they enter the insurance upon my open-policy book. I retain the certificate when the boat for whom I take out the insurance clears, and I collect the premium from the master of the boat and pay it to the insurance company for him and give the certificate to the shipper of the cargo.

47 Q. In whose name is it entered upon your book by the insurance company?

Mr. McCARTHY: I object on the ground, first, that the book ought to be here; and, second, that it is not a custom, but it is an individual concern.

Objection overruled.

A. Whose name is entered on the insurance book in which the risk is written?

By Mr. HYLAND:

Q. Yes.

A. The name of the person making the application—the scalper.

Q. Now, who under the custom pays you for doing that?

Mr. McCARTHY: I object to that as incompetent.

Objection overruled.

A. The captain pays the money to me. He pays for the insurance; the carrier, I suppose.

By Mr. HYLAND:

Q. Have you in your business met with losses while a cargo has been in transportation?

A. Yes, sir.

Q. I want to know what the transaction is, if any, between you and the captain when you clear his boat, with reference to the premium; and, if so, what the custom is between you and the captain.

Objected to. Objection overruled.

The COURT (Judge Coxe) (to the witness): You are testifying not to what you have done personally, but to the general custom.

A. The general custom in clearing a canal-boat in Buffalo is to keep a memorandum on what is called a day book of the
48 advances made to the captain, and of those items the insurance is one, and a copy of that book entry, which is obtained in the office of the scalper, is put on the captain's bill of lading as a memorandum for him.

Q. Now, what is the custom between you and the agent of the insurance company as to the issuing of the open policy in the early season of the year? I want to know how that is brought about, who makes the application for the open policy, and how it is delivered to the respective forwarders.

A. The custom has been for the insurance company to issue them voluntarily without any requisitions. I have read some of these open policies.

Q. Do you know, as a matter of fact—I refer to the clause which I have already read—whether that clause was the same in all these policies or not? I read from the Claimants' "Exhibit A," page 109, folio 326:

Q. By this policy of insurance, on account of H. Morse & Co., for whom it may concern:

"Do insure the several persons, whose names are hereafter endorsed hereon as owner, advancer or common carrier on goods, wares, merchandise or country produce, on his own boat, or boats belonging to others, loaded on commissions or chartered.

"From place to place, as endorsed hereon, or in a book kept for that purpose, for the several amounts, at the rate, and on the goods, wares, merchandise, or country produce, as specified in the said endorsement."

49 Do you know whether that clause is found on these open policies, as a rule, which you have mentioned?

A. Those were printed forms. They were uniform. They were uniform in that regard.

Q. You stated in your examination that the certificate was annexed to the bill of lading as collateral security. Well, what do you understand by that statement "as collateral security"?

A. It insures the carrier.

Q. Well, how is it collateral security to the bill of lading?

A. It makes the bill of lading good to that ectent.

Mr. MCCARTHY: I object to it.

Q. And you endorse that certificate?

A. If made to my order; yes, sir.

Q. You stated something about at one time a bill of lading was supposed to be sufficient security. How long since there has been a change in that regard?

A. Prior to my time; since my time it has been done in this way.

Q. Is there anything said ever in the bill of lading which con-

tains a shipping contract between the shipper and the middleman and the captain about insurance?

Mr. McCarthy: I object to it as incompetent and improper.

Objection overruled.

Q. The contracts are printed in the bill-heads on both sides.

By Mr. Hyland:

Q. Do you understand, then, Mr. Bissell, that the bill of lading contains all the covenants and agreements which the middle-
50 /an and the captain makes with the shipper?

Mr. McCarthy: I object to it.

By the Court (Judge Coxe):

Q. Is there anything further in the mode of doing business which you can state?

A. No, sir.

By Mr. Clinton:

Q. I wish to call your attention to a subject that has been read in evidence (exhibiting book to witness at page 119). Is that the memorandum which you say is first entered in the day book and then transferred to the bill of lading?

A. Yes, sir; that is the method of doing it. The items might vary.

Q. During the time you have done any business in Buffalo, did you do business with the New England underwriters?

A. I have done business with so many companies.

Q. You have known of their being in business and have done business yourself for 20 years?

A. I have done business with a good many companies. If this company was in business during any time between the years 1867 and 1885 I have necessarily transacted some business with them.

Q. The New England underwriters?

A. I remember the name as one of the insurance companies there, and undoubtedly I transacted business with them.

Q. And, as I understand you, previous to the time when these insurance policies were taken out the shipper had but the security of the bill of lading?

A. That is all.

Q. That only represented the financial responsibility of the cargo?

A. Yes, sir.

51 Q. Then when the change was made the shipper got in addition this insurance?

A. Yes, sir. (Folios 86–123.)

(Stipulated by the libellants that the witnesses Sidney H. Finn, John S. Heath, forwarders, and Edward W. Eames, shipper, who were present in court, should be deemed to have given the same evidence as to custom as given by the witness Bissell and the same evidence on cross-examination.) (Fol. 134.)

WILLIAM MEADOWS, called and sworn for the respondent- Morse, and examined by Mr. CLINTON, testified as follows:

Q. You reside in Buffalo, Mr. Meadows?

A. Yes, sir.

Q. Do you remember the occasion of shipping some grain to New York, I think, in 1883, on the canal-boats Worden and Sydney?

A. You ask me whether I remember tthat particular shipment. I can't say that I do, except in a general way.

Q. But you have had some occasion to know of the litigation concerning it and on the former trial you were a witness?

A. Yes, sir.

Q. That is the way you know in a general way. Do you remember when that was?

A. I don't know that I do. I don't know that I could say. I suppose the record shows it.

Q. Do you remember with whom as scalper or commission merchant you did the business?

A. Well, I believe it to have been Morse & Company.

Q. Have you any recollection as to the particular individual?

A. No. I can't say that I personally made the trade. There are two other members of the firm.

52 Q. Can you give any of the details of that transaction?

A. I can't say except by referring to the memorandum. I can't say from recollection.

Q. Do you know the general custom or method or course of business by which those transactions are carried on in Buffalo?

A. Yes, sir.

Q. Have you been familiar with it for some time?

A. Yes, sir; a number of years.

Q. Mr. Meadows, in this particular instance was there any direction given by you or whoever you made the agreement with to get the cargo insured or to get it insured in any particular company?

A. Well, I can't remember at this time whether I personally gave any directions. I suppose I did not personally.

Q. Under the general course of business, as you knew it at that time, was it assumed by you and, so far as you know, the party with whom you were dealing that the cargo would be insured under the course of business?

A. Yes, sir.

By Mr. HYLAND:

Q. Do you know, as a matter of fact, that H. Morse & Co. acted, at the time this load was secured, as agent for the captain of the boat Worden?

A. Do I know it? No, sir.

Q. Was this transaction with the boat Worden, so far as giving the load and as accepting the certificate of insurance, done in the same way that you have been in the habit of doing with all such transactions prior to that time?

A. Yes, sir; I should think it was.

Q. And for how long a period?

53 A. Well, I have been engaged in that business for ten or eleven years before 1883.

Q. And is the method which you do business the same as other shippers in the same line of business?

A. I believe it is.

HENRY MORSE, one of the respondents, called and sworn in his own behalf, and examined by Mr. CLINTON, testified as follows:

Q. You are one of the respondents in this action, Mr. Morse?

A. I am.

Q. You were one of the witnesses on the trial of the Sydney case?

A. I was.

Q. Sworn on behalf of the claimant, Mr. Wager, in that action?

A. I was.

Q. Upon the trial of that action you testified, in answer to questions put to you by Mr. McCarthy, to a bargain made with Mr. Meadows in regard to this shipment?

A. Yes, sir.

Q. Will you state what your recollection is in regard to that and whether you made the arrangement with Mr. Meadows yourself or not?

A. ——.

Q. I call your attention to the testimony in the former case, at folio 216: "You applied to Mr. Meadows for the job—if I may use that inelegant term—and you applied for a load to take to New York, or he applied to you for a boat." I ask you whether, in testifying to that, did you intend that you, individually, made the application, or the firm.

A. I am a member of the firm. I can't say whether it was me or my brother.

54 Q. Whether you or your brother Alanson you wouldn't swear?

A. No, sir.

Q. In the same connection, in response to the question, "You undertook and agreed with Mr. Meadows, then, to find transportation for his grain and to get it insured" you answered, "Yes." I will ask you the same question in regard to whether you intended to testify that you personally did that.

A. Well, I can't say that I did.

Q. In that testimony you were referring to your firm?

A. As made by the firm; that was what I intended to mean.

Q. Now, Mr. Morse, did you at any time make any bargain with Mr. Meadows yourself in regard to this shipment other than the usual transaction in the course of that business?

A. I did not.

Q. Was there any specific agreement or direction from him to you in regard to the insurance?

A. Not to my recollection.

Q. On the trial of the Sydney case, Mr. Morse, these questions

were asked you: "When the loss occurred and the money had been paid over to Meadows or Meadows' principals, do you pretend that you had any right to that money?" and you answered: "So far as our interest was concerned." The question was then asked: "Your interest as advancer?" You answered: "Yes." The question was then asked you: "But any other right?" You answered: "Not any." The question was then asked you: "Your interest as advancer amounted to $520?" You answered: "Yes." The question was then asked you: "And you don't pretend that yourself—
55 your firm—had any right whatever to the residue of the money that was paid to Armour, Plankinton & Co.?" and you answered: "We did not. We did not own the property." Will you state if you have any explanation that you desire to make of your meaning in giving that testimony?

A. As we had endorsed the certificate of insurance over to Mr. Meadows, we supposed—I mean—my meaning was that we had no right to the money; that would belong to Plankinton & Co. or Armor, Plankinton & Co., as they were the owners of the grain, and I thought it was just and right that they should be paid for their loss, and we had no right, as I understood it, to that money, or, as I meant to be understood, we had no right to that money.

Q. You mean having no right to the certificate of insurance upon the grain; you had no further right to collect it?

A. Yes, sir.

By Mr. HYLAND:

Q. I think you stated on your examination that you had had a conversation with the insurance companies in regard to the issuing of these open policies and certificates of insurance. Have you a recollection of testifying to that?

A. I have almost forgotten, but I presume I did.

Q. As a matter of fact, have you any conversations with this insurance company or their agent or its agent with reference to the issuing of these open policies and the certificate of insurance?

A. I have.

56 Q. And in that conversation was anything stated to you with reference to whom they intended to insure by these open policies and certificates of insurance?

Mr. MCCARTHY: I object to it on the grounds, first, that the evidence cannot be used to contradict this written evidence; and, second, the testimony is too vague as to what agents; and, third, Mr. Morse has already testified what his intent was as to whom was protected by that certificate.

The COURT (Judge Coxe): I think he may answer.

(Exception.)

By Mr. HYLAND:

Q. State what it was.

A. In taking out these policies I talked with the agent—whoever

brought them around—as to who was intended to be insured under these policies.

Mr. McCARTHY: I further object that the agent cannot bind the insurance company by that sort of loose talk.

By Mr. HYLAND:

Q. Have you had conversations with the general agent of this company?

A. Whether I had in regard to this policy or not I don't know, but I had in a general way heretofore in regard to their company, whatever company that they might represent.

(Mr. Hyland reads from the opinion of Judge Wallace, 27 Fed. Rep., p. 125.)

Q. Now, the term "for whom it may concern." Who was intended to be insured by that clause?

A. Ourselves and the captain.

Q. The captain of the boat?

A. The captain and owner of the boat.

57 Q. Was that so expressed by the assurance of the agent, as well as your own intention?

A. Yes, sir.

Cross-examination by Mr. McCARTHY:

Q. Do you remember some of the testimony or any that you gave on the trial below?

A. I do, some.

Q. Did you not intend that in respon-e to that question to protect the owner of the cargo?

A. I presume very likely I did.

Q. Didn't you also say that you got that insurance perfected pursuant to your contract with Meadows?

A. I probably did.

Q. Did you not also say that the money which Meadows agreed to give you covered the insurance premium as well as your freight?

A. I might have said so.

Q. If you did say so, was it true?

A. Well, we paid this insurance.

Q. Answer my question. You didn't mean to tell any untruths in the court below?

A. I don't mean to here.

Q. If you so testified on the trial below, you thought it was true?

A. I thought it was true if I said so.

CHARLES E. WAGER, one of the respondents, called and sworn in his own behalf, and examined by Mr. HYLAND, testified as follows:

Q. Mr. Wager, you are one of the respondents in this case?

A. Yes, sir.

58 Q. And in 1883 you were the captain and owner of the boats Sydney and Worden?

A. Yes, sir.

Q. And you took this cargo of grain that is now in question and put it on board the Worden?

A. Yes, sir.

Q. And will you state how long you have been engaged in the transportation business on the canal?

A. It will be ten years this spring.

Q. And during that time as master of boats?

A. Yes, sir.

Q. And in the grain business?

A. Yes, sir.

Q. Do you remember the occasion of taking this cargo on board of the Worden that was lost in the Hudson river?

A. Yes, sir.

Q. Now, state how this cargo was taken.

A. I came to Mr. Morse's office.

Q. In Buffalo?

A. In Buffalo; yes, sir; and asked him for a load.

Q. Whom do you speak of?

A. Mr. Henry and Mr. Alanson Morse.

Q. Were they both in the office on this occasion?

A. I couldn't say whether they both were. I remember that Alanson was.

Q. Now, what occurred?

A. He said that he could get me a load, and asked me to go along with him.

Q. And did you go?

A. Yes, sir.

Q. Where did you go?

A. We went up into Mr. Meadows' office.

Q. Whom did you go with?

A. Alanson Morse.

59 Q. And Mr. Alanson Morse is in court?

A. Yes, sir.

Q. And he is a member of the firm of Henry Morse & Company—a partner?

A. Yes, sir.

Q. What occurred up there, if you know?

A. We went in and asked Mr. Meadows if he had any grain, and he told him yes, that he had some five-cent wheat. Mr. Alanson Morse took the order and gave it to me.

Q. Did you hear any further conversation than what you have stated?

A. No, sir; I did not.

Q. And he gave you the order for that cargo?

A. Yes, sir.

Q. Then what did you do next?

A. I went and got a tug and took her to the elevator and loaded her.

Q. What does the order read?

A. It was an order on the elevator.

Q. After you loaded the boat what did you do?

A. Towed her down the canal.
Q. What did you do with reference to the policy?
A. Came up to the office and got a bill of lading and my policies.
Q. Now, with whom did you do that?
A. Mr. Fero.
Q. Who is that?
A. The book-keeper.
Q. In whose office?
A. Mr. Morse's office.
Q. What was said between you and Mr. Fero about your cargo?

Mr. McCarthy: I object to the question *inter alia;* it is no part of this case, a conversation between this witness and the book-keeper.

By Mr. Hyland:

60 Q. What did you do about insurance with either of the Morses?

A. I asked them in what company my grain was insured, as I had generally done so in cases.

By the Court (Judge Coxe):

Q. What did you say then?
A. I told them to insure my grain in a good, safe company.

By Mr. Hyland:

Q. You asked who the agents were?
A. Yes, sir.
Q. What did they say to that?
A. Mr. Worthington and Mr. Sill.
Q. Now, was there any account made up between you at that time before you left Buffalo?
A. Yes, sir; I think it was fourteen dollars and something on my shipping bill.
Q. And was that deducted from your freight?
A. Yes, sir.
Q. About that time?
A. Yes, sir.
Q. Before you left Buffalo?
A. Before I left Buffalo.
Q. What bills of lading did you sign?
A. I signed, I think it was, five bills of lading.
Q. Did you sign also a bill of lading *also* with Morse & Company besides the one that you signed with Meadows?
A. I don't recollect whether I did sign one with Mr. Morse, but I recollect of signing five.
Q. Five bills of lading?
A. Yes, sir.
Q. Do you recollect of having a bill of lading on the back of which was endorsed the various items that were advanced to you by H. Morse & Company?

A. Yes, sir; that was the bill that I took with me.

Q. Do you remember where it was that you signed the bill of lading that was delivered to Mr. Meadows that Morse & Company also signed?

61 A. At Mr. Morse & Company's office in Buffalo, at the central wharf.

Q. Were these items deducted from your freight: Insurance, $14.82; commission, $19.75; trimming, $9.87; cash, $34.74; H. Morse, $240.26?

A. Yes, sir.

Q. On this bill of lading of the Worden on this cargo?

A. Yes, sir.

Q. And at the time of your bill of lading do you recollect whether you signed those bills up in their book that they keep for that purpose?

A. Yes, sir; I did.

Q. And acknowledged the receipt of those items in their book?

A. Yes, sir.

Q. I find that there was $75 still due you on the freight according to the bill of lading which you were to collect of E. D. Brooke & Company in New York?

A. Yes, sir.

Q. That is, you drew all your freight on this cargo in the method above stated except $75.56?

A. Yes, sir.

Q. That you left still to draw?

A. Yes, sir.

Q. Now, when you arrived in New York did you draw that $75.56?

A. No, sir; that went for the average that I paid for insurance.

Q. That is, it was allowed as your average by the insurance company on this cargo of wheat and never was paid to you?

A. No, sir.

Q. Since you have been in the business have you always insured your cargoes on your boat?

A. Yes, sir; I have. Do you mean pay for them?

Q. Yes.

A. Yes, sir.

62 Q. Has it always been deducted from your freight?

A. Yes, sir.

Cross-examination by Mr. McCarthy:

Q. You don't profess that the insurance premium, as you say, estimated at $14 and some cents, was paid to somebody by you, do you?

A. Yes, sir.

Q. Out of your own pocket?

A. Deducted it out of my freight.

Q. In the United States district court against the two boats Sydney and Worden you were a claimant and you were the nom-

inal owner of these two boats. Were you the claimant in that suit?

A. Yes, sir.

Q. And you were the nominal owner, at least, of those two boats, the Sydney and the Worden?

A. Yes, sir.

Q. And you were interested as such owner in those two boats?

A. Yes, sir.

Q. If you requested anybody in Morse & Company's office to insure that grain for your benefit why didn't you appear and swear to that then?

A. Because there was nobody asked me then.

Q. You also took an appeal then?

A. Yes, sir.

Q. Why didn't you appear in the United States circuit court and swear to that statement?

A. Because there was nobody asked me to.

Q. You did, however, appear in the United States court and testify, didn't you?

A. I don't recollect whether I did or not.

63 Q. Don't you remember that you were examined?

A. I was examined there, if that is what you call the United States court.

Q. But didn't you know all the time that the question was who was to have the benefit of that insurance?

A. No, sir.

Q. Now, who was it that you saw in Morse & Company's office about this insurance business?

A. I saw Mr. Faro, and Mr. Alanson Morse was there.

Q. Whom did you have the conversation with? Whom did you ask in Morse & Company's office to get an insurance on that grain for your benefit?

A. Mr. Alanson Morse and Mr. Fero.

Q. Did you ask Mr. Fero?

A. I asked him as much as I did Mr. Morse.

Q. Did you ask Mr. Alanson Morse to get an insurance on that cargo for your own benefit?

A. I said it to them both.

Q. Did Mr. Alanson Morse hear you state that?

A. Yes, sir.

Q. Was that before or after your load started?

A. It was before the load was on the boat.

Q. What reply did he make?

A. He told Johnny to attend to it and Johnny said he w-uld.

Q. Did you know whether or not at that time the insurance had actually been had on that cargo?

A. No, sir; I did not.

Q. Do you now know whether the insurance had been obtained at the time you made that request or not?

A. No; I do not.

64 JOHN S. HEATH, called and sworn for the respondent, Wager, and examined by Mr. HYLAND, testified as follows:

My business is forwarding and commission, and I reside in Buffalo. I have been engaged in the business there of forwarding about twenty-five years. I am in the same line of business that H. Morse & Company are. I think I know what their system of business is in reference to loading boats and insuring boats. I was with them some ten years. They were engaged in that business at that time. The system which I employ is the same as Morse & Company employ. We have open policies from several companies to do business on for the season issued to us. We have had policies from the New England underwriters. When a certificate of insurance is issued to me on any individual boat or cargo there is an entry made in my book.

Q. In the method in which you do business with the insurance companies do you intend, in issuing these policies, to insure the captain of the boat that takes the cargo?

A. We certainly always thought so. That is our intention—to cover ourselves and the captain. That has always been so regar-ed in our business since I have been in it. I don't know that I have had any conversation with the general agents of the insurance companies in regard to whom they intended to insure in issuing these policies. We intend to insure the captain's interest, his freight, and our advance charges; the captain's interest in the cargo. I understand that the captain has an interest to the amount of the freight and the delivery of that cargo. When the insurance company issues the certificate they make it payable to our order and we
65 endorse it to the man that ships the grain.

(Cross-examination waived.)

ALANSON MORSE, called and sworn for the respondent Wager, and examined by Mr. HYLAND, testified as follows:

Q. I was at the time that this cargo was taken a member of the firm of H. Morse & Company, and I know Charles E. Wager, the captain of the boat Worden. I recollect the spring or the time this cargo was taken. About that time I recollect of meeting and seeing Capt. Wager. As near as I can recollect I took that load for Capt. Wager at five cents a bushel, the usual rate. He took it and loaded it and carried it until he met with his accident. I am not positive, but I think I did apply to Mr. Meadows for the cargo, as I took most of the freight. I think I did it. At the time I took this cargo I fixed the rate, and Mr. Meadows gave me an order and I shipped it the usual way. There was nothing said, to my recollection, about insuring the cargo by Mr. Meadows to me.

Q. Now, whom did you intend to insure by the clause "for whom it may concern" in this policy when you issued the policy to H. Morse & Company?

Objected to. Exception.

Q. On this occasion, when this policy was issued out to you "for whom it may concern," whom did you intend to insure?

Mr. McCARTHY: I object to it—as to whom he intended to cover when he got out this certificate.

66 Objection overruled. Exception.

By Mr. HYLAND:

Q. Whom did you intend to insure?
A. Captain Wager and myself.

Cross-examination by Mr. McCARTHY:

I am not positive whether I got out the certificate, or the clerk. I can't tell who applied to the insurance company for this certificate. I at once endorsed the certificate over to the owners of the grain to secure them as collateral security that we would deliver that cargo in New York all right. We didn't know who the owners were when we took it. I knew who Mr. Meadows was.

(It is admitted that there is a decree *in rem* against the boats, in which action the defendant Wager was claimant, and which is now pending on appeal in the U. S. Supreme Court at Washington.) (See fol. 192, Morse apostles.)

67 WILLIAM MEADOWS, being duly sworn and examined as a witness for the libellants (in the Sydney suit), testifies:

Examined by Mr. McCARTHY:

I am the gentleman referred to in the bill of lading, the shipper; I reside at Buffalo; my occupation is commission merchant, mainly in handling grain, and that was my occupation in the month of May, 1883. (Witness handed Libellants' Exhibit No. 1.) I am the gentleman referred to as the shipper in that bill of lading. I had this cargo of seventy-nine hundred bushels of wheat there. It was consigned or was about to be consigned to Armour, Plankinton & Company, of New York, who were the owners of the cargo in this case. I contracted for the transportation and insurance of this cargo at Buffalo.

(Exception. Admitted in evidence.)

Q. With whom did you make that contract?

Objected to on the ground that it should appear whether the contract was in writing or not.

Q. Was the contract in writing?
A. No; verbal; the contract was a verbal contract—that is, it was made before the bill of lading was signed. I made that contract with Morse & Co., whose names are attached to the bill of lading.
Q. What was the transaction between yourself and Morse & Co.?

The COURT (Judge Brown): In the first place, state what Morse & Co.'s business was.

The WITNESS: They are known there as agents of canal-boats—forwarders and owners of canal-boats; scalpers they are commonly known as.

68 (By Mr. McCARTHY:)

Q. What transaction did you have with them—Morse & Co.?

A. Morse & Co.? I don't know. I can't recollect just now the exact manner in which this particular boat-load of grain was shipped, but the ordinary way would be, I would either go to Morse & Co., who had boats, or they would come to me, having the property to ship, and we would agree upon the rate of freight for carrying that load of wheat to New York. After that agreement was made Mr. Morse would go to my office and get an order for the load of wheat. At the time of getting the order my man, my book-keeper, who writes the order, will instruct him where to insure it; that is a part of the whole contract. Morse & Co. go down and make their application for insurance, and when the boat is loaded or before it is loaded the certificate is sent up to my office, and when the bill of lading is signed, as far as my party is concerned, the contract is consummated. The bill of lading is signed by Morse & Co. and a copy is signed by myself. The insurance certificate is either brought to me at the time the bill of lading is brought or before. We usually require them before, so that we know that the boat is insured before she is loaded or by the time she is loaded. I would not accept the bill of lading without the certificate. The premium is paid by the carrier, Morse & Co.; they pay the insurance company. The account is made against them. Their contract with me is to carry
69 that cargo to New York as well as to insure it. The rate named there covers the insurance, $516.94. I suppose that is the amount. Maybe that includes the advance charges. (Examining the paper:) That $516 includes the advance charges.

(By the COURT, Judge BROWN:)

Q. The rate agreed upon for transportation to New York includes the insurance premium?

A. Yes, sir; that rate includes the paying of the premium.

Q. In saying that the rate covers the insurance, do you mean to state to the court that the rate for transporting to New York agreed upon with Morse & Company includes the premiums to be paid upon the certificate?

A. That is a part of the contract as we understand it; yes, sir—that they shall furnish the insurance, furnish the insurance certificate and pay the premium upon it, but hand it over to me as insurance on the property. I would not give him the cargo if he didn't do it. When the insurance certificate is handed to me the indorsement like what is upon Exhibit 2 is made upon it at that time; it is indorsed over to me in this way. That is done at the time and not after the loss happens; that indorsement is made at the time the certificate is delivered to me.

(By Mr. McCarthy:)

Q. You speak of custom or what would be done ordinarily. Wasn't that the state of facts in this case?

A. Yes, sir.

Q. Does this bill of lading and certificate of insurance go on to New York before the boat leaves Buffalo?

A. It did in this case. Before the boat leaves Buffalo? I can't say as to that. It goes promptly at once where the property is owned in New York. Both are sent to the owners of the
70 grain or as directed. The rate of transportation is paid by the owners on the delivery of the cargo in New York less the advance. There are advance charges they usuallt pay me, charges that accumulate before it arrives in Buffalo; but that has no bearing on this case at all. (Folios 57–67.)

(By the Court, Judge Brown:)

Q. Have you any knowledge whatever in regard to any interest of the owners or captains of the boat in the insurance or as respects the payment of the premiums of insurance?

A. Nothing; only what I have stated. I will say this: the captain is supposed to have his freight list insured in this particular policy—that is, his advances, what has been advanced to him, and the freight list, as it is called on the lakes or ocean, to the amount, probably, of five hundred odd dollars, and he would claim that; they usually take out a separate policy for that claim, but in this case it must be all included in the one policy—a separate certificate, I mean, which the carrier holds; in this case the advances and freight list is all merged in one certificate; they are different things, but they are included in the one certificate. (Fol. 79.)

Henry S. Sill, being duly sworn and examined as a witness for the claimant (in the Sydney suit), testifies:

I reside in Buffalo; I am in the business of insurance there, and have been for seventeen years; in May, 1873, I acted for the New England underwriters, where this cargo was insured; I am the agent of that company; Exhibit A is in form the same as the
71 policy No. 772 § issued to Morse & Co.; we issue this kind of open policies every spring ourselves at Buffalo, and we deliver them to the scalpers; they run for the season—that is, until the Erie canal closes; they are issued solely for business on the canal and rivers.

By Mr. Hyland: When that is issued, in what manner do you take the risk on any single cargo under that open policy? What is the manner of insuring any single cargo under that open policy?

A. The application is made under this open policy in writing by H. Morse & Co.

Q. Look at that paper handed to you and see if that is a copy, a form of the application.

A. That is the customary form; yes, sir.

Mr. HYLAND: Now, I will ask the libellant to produce the application made for the insurance of the cargo, the application on which Exhibit No. 2 was delivered.

It is produced and offered in evidence.

Libellants' counsel objects to it as tending to add to or explain or contradict the contract of insurance, which is in writing.

It is admitted and is marked Claimant's Exhibit B.

(Exception.)

Mr. HYLAND: It reads as follows: "Worthington & Sill, general agents New England underwriters, canal insurance office, No. 48 Main street and 10 Dayton street, Buffalo, New York. Insurance is wanted by H. Morse & Co. Loss, if any, payable ditto or order on wheat on board, cargo of boat, 'William Worden,' $9,875,
72 from Buffalo to New York. Rate: — cents, $—." (That blank ought to be supplied; that is in the original, I apprehend.) "Total premium, $—. Buffalo, May 17, 1883. H. Morse & Co., applicants."

By the COURT (Judge BROWN):

Q. What is the rate that is inserted in such a form?

A. I couldn't say.

Q. Does that specify the rate agreed on in each case?

A. We enter the rate according to the class of the boat as we insure it. I don't remember the class of that boat.

Q. Is the figure filled out what is the actual contract or is it merely a formal entry?

A. We enter that ourselves, with reference to the exact contract. There is nothing in the contract policy that stipulates what the rate shall be. The premium is always inserted; we insert that ourselves and charge to H. Morse & Company. The premium is regulated by this particular boat; but boats are charged according to their class; so much as first, second, and third class. I think this boat classed first at that time. That is put in this application. The certificate does not contain the amount of premium that is charged for the particular cargo. The certificate does not contain any premium, not as a general thing; sometimes they are entered on by request.

By Mr. HYLAND:

Q. On the presentation of this application (Claimant's Exhibit B) to you what did you do? What did you issue to H. Morse & Company, if anything?

A. We issued a certificate.

Q. Look at Exhibit No. 2 and see if that is the certificate which you issued to H. Morse & Company.

A. Yes, sir.

73 Mr. MCCARTHY: I will admit that it is and that it was issued as soon as they got that application.

Q. When this application is made and the certificate issued what entry do you make on your books as regards the party insured, if any?

By Mr. McCARTHY:

Q. Was an entry made in this case?
A. Yes, sir; there was an entry made.

Mr. McCARTHY: Let us see the entry; I object to any oral testimony in regard to it.

By Mr. HYLAND:

Q. Where was that entry made?
A. In the open-policy book of H. Morse & Company, and it was made in the name of H. Morse & Company.
Q. I hand you a book; please look at the entry made there under the name of William Wager and tell me if you know whose handwriting that is; it is date- the 17th.
A. Yes, sir; it is the handwriting of Mr. Bentley, our marine clerk. This is the open-policy book we issue; it is the bo-k we issue to H. Morse & Company to keep a record of their insurance that they applied for.

By the COURT (Judge BROWN):

Q. Do you mean that it contains the policy?
A. This book is mentioned in the policy; the different insurances we take out afterwards refer to the conditions of it; it is the condition which the insurance was afterwards made subject to; that open-policy book does not cover any particular risk unless we have special application made and entered up under the subject and conditions of that policy, and each insurance has to be a separate entry and it is subject to that policy; the number of the policy is stated
74 in this book; that policy covers nothing until it is entered in this book.
Q. The open policy by itself amounts to nothing? It is merely preliminary, which takes effect according to entries, and this is the book which contains the entries?
(No answer.)

By Mr. McCARTHY:

Q. It merely contains the general conditions by which you agree to be bound?
A. That is it.

By the COURT (Judge BROWN):

Q. And each particular piece of insurance which is adopted under the general policy?
A. Yes, sir.

By Mr. HYLAND:

Q. Please read the entry in that book on May 17, 1883.

Mr. McCARTHY: Whose entry is it?
Mr. HYLAND: His own clerk's.

A. (Reading:) "H. Morse & Company, boat 'William Worden,' from Buffalo to New York, $9,875; rate, 15 cents; premium, $14.82; wheat.

The COURT (Judge Brown): It ought to be noted that these books contain these entries under the various columns, which are headed "Date," "On whose account," "Boat," &c., and that the name of H. Morse & Company is in the column headed "On whose account."

Q. (Handing witness a book:) Does that book have the open policy pasted in the beginning?

A. Yes, sir.

Q. Then this book ought to have the policy there?

A. I couldn't say that it is pasted in. It is customary for
75 us to do that. I do not know what became of the policy itself. As a matter of fact there are no entries made on this policy after it is issued at all. There are no names endorsed upon the open policy at all after it is delivered; it is all done on the book.

The open-policy book is offered in evidence and marked Claimant's Exhibit C.

Q. Who paid the premium in this case, if any was paid?

A. H. Morse & Company.

By Mr. MCCARTHY:

Q. Was there a premium paid?

A. Yes, sir; the premium was paid; I suppose it was paid.

Q. Wasn't credit given as usual?

A. It was if it was paid; I didn't keep the accounts myself; I couldn't swear that it was paid.

Q. Don't you know, on the other hand, that in this case, as in every other, a credit of thirty days was given?

A. No. *Q.* I don't know that credit was given; it is not customary to give a credit of thirty days; it is customary to give a week's credit. I think this loss did not occur before the week was up.

By Mr. HYLAND:

Q. Look at Exhibit C and see whether that shows whether the premium was paid or not.

A. Yes, sir; it was paid May twenty-third, by H. Morse & Company. I have been an agent there some seventeen years.

Q. When you took that risk for the company did you know the relation that existed between H. Morse & Company and Captain Wager, of the boat "Worden"?

A. I can't say that I knew it.

76 Q. Do you know whether the insurance company regarded that there was any relationship existing between H. Morse & Company and the captain of the boat?

Objected on the ground that it is leading and because the witness has already said that he didn't know; that both parties are here and that it is not proper to ask this witness.

The COURT (Judge Brown): He may state anything that he knows.

Exception.

A. I can only say that I have always regarded——

Mr. MCCARTHY: You are to state only what you know in this particular case.

A. (Continuing:) I only know from the fact of what has always been regarded.

Q. You mean with reference to the custom?

A. Yes, sir; with reference to the custom. I couldn't swear that Mr. Morse was his agent, but I know it was so regarded.

Q. Do you know that the company regarded him as such?

Objected to.

The COURT (Judge Brown): I think it is competent to prove by this witness that the company intended to insure and whom and what interest they intended to insure in the act which they did. He may show what they understood on that subject, if there was any understanding about it.

Exception.

By the COURT (Judge BROWN):

Q. You may state what notice or knowledge or understanding the company had in regard to whom was to be benefited by this insurance when applied for.

77 Mr. MCCARTHY: I think that question is objectionable as to form.

A. We regarded H. Morse & Co. as the ones to be benefited. (Folios 90–109.)

(By the COURT, Judge BROWN:)

Q. In insuring in this way—receiving this application and making that entry in your policy book—do the company understand that the design is, on their part, to benefit anybody else besides Mr. Morse? Do they understand that that was designed to protect the boat against loss as the carrier of the goods as well as Morse & Co.?

A. Yes, sir.

(By Mr. HYLAND:)

Q. At the time the policy is issued is there any understanding of any kind that you are to protect any one else by that insurance except Mr. Morse and the boat—as, for example, the consignee of the cargo or the owner of the cargo? Do you know any one else?

A. No, sir.

(By the COURT, Judge BROWN:)

Q. You say that so far as you know the company do not design to protect the owners of the goods?

A. I say I don't know anybody but Morse & Co. to be protected under that policy, and the boatman.

(By Mr. HYLAND:)

Q. Have you settled up many losses since you have been agent there?

A. Yes, sir.

Q. Have you known of a single instance where the insurance company has paid the loss on an endorsement of this certificate that the insurance company have thereafter made any demand upon the boat on the ground that they are subrogated in the position of the owners of the cargo whom they paid?

78 A. Not on the boat that held the cargo.

Q. Have they ever, to your knowledge, brought a claim against the boat or the captain of the boat where she had been insured in the manner in which this was?

Objected to. Objection overruled.

A. I can't recall a case.

Q. Did Mr. Morse & Company do all their business in your company that season, or do you know whether they did or not?

A. I don't know that they did. I think not. (Folios 117–120.)

Cross-examined by Mr. MCCARTHY:

I am no longer the agent of the companies. I think it is about a year ago that I ceased to be their agent. Our firm of Worthington & Sill are no longer agents of either of the companies. I came here at the request of Mr. Morse.

Q. (Handing witness a letter:) Did you write me that letter?

A. That is my handwriting. Yes, sir.

The letter is marked Libellants' Exhibit No. 4 for identification.

Q. (Handing witness another letter:) And likewise this letter?

A. Yes, sir.

The letter is marked Libellants' Exhibit No. 5 for identification.

Q. Did you draw that receipt?

A. No, sir; it was drawn by our office; that is the same thing; it was drawn by our office. At the time that receipt was

79 signed by H. Morse & Company we, acting for the companies, paid him some money.

Q. Look at the paper and see how much was paid him.

A. We paid him five hundred and twenty dollars.

Q. That included this very premium, didn't it, that Morse & Company had paid?

A. That five hundred and twenty dollars? No. That five hundred and twenty dollars, it is said in this receipt, represented Morse's interest. It is his interest, I suppose, and we undertook to be subrogated to that extent in Morse & Company's right—that is to say, if he had a bigger interest we would want a bigger subrogation. We intended to get a subrogation to all Morse's rights. The com-

panies were subrogated to the extent of five hundred and twenty dollars.

Q. How did Morse get that interest?

A. I suppose that is Morse's interest as common carrier. That interest is the earned freight and the back charges—the lake charges and the freight that is earned.

Q. Precisely; and that represents all of Morse's interest, doesn't it?

A. That is the bill.

Q. Because that is all the subrogation you have got?

A. Yes, sir; that is all the interest he had; that subrogation was effected against Morse & Company. (Folios 121–'6.)

Assuming that the loss had been occasioned through the negligence of the canal-boat, I should think that receipt gave us the right of subrogation against the canal-boat. I didn't give the matter any thought at all when that receipt was taken. It would give us that right because of our having paid Morse $520. This cer-
80 tificate is issued to cover $9,875. If I deduct from $9,875 the sum of $520, the residue does not stand for the value of the cargo, it stands for the amount of insurance. The certificate, as it stands there, is to represent the amount of the insurance irrespective of the value of the cargo. The amount paid by the New England underwriters, $9,211.75, to Armour, Plankinton & Company does not represent or contain the whole value of that cargo. It represents the value of the cargo less the earned freight and the back charges. I think I sent that money to New York. I sent it to James Matthews in New York, and I told James Matthews to whom to pay it. I told him to pay it to Armour, Plankinton & Company. I did that because I knew that Armour, Plankinton & Company were the owners of the cargo. (Folios 129–131.)

Q. (Handing witness the abandonment:) It is dated the 26th day of June?

A. I don't remember of ever seeing this abandonment. Mr. Matthews was acting for us here. I know we proceeded to recover what we did of the cargo before the 26th day of June, and this abandonment is dated that day. I know that because the loss occurred before, I think, if you will allow me to refer to my memorandum (referring to a memorandum). I know we proceeded to rescue the cargo before the 26th day of June because the loss occurred on the 29th day of May; I have no other reason. We took steps in regard to the cargo before the abandonment. (Referring to memorandum:) It is true that we recovered from the sunken boat cargo which we afterwards sold for $3,335.86. I have it in my memorandum, and that is true; that is the net amount received; that money was retained by the insurance companies. (Folios 136, 137.)

81 (By the COURT, Judge BROWN:)

Q. Did you have anything to do personally with attending to the wreck?

A. No, sir.

(By Mr. McCARTHY:)

Q. Under and by what authority did you do all those things?

A. By the authority from the companies.

Q. On what principle or theory were you acting in taking that cargo, selling it, and appropriating the money?

A. On the principle that it comes within the province of the duties of the general agent of the insurance companies.

Q. You treated that as the cargo of the persons insured and which you paid for?

A. Yes, sir.

Claimant's counsel asks that the last question be read, and thereupon states that he objects to it as to form.

The WITNESS: I would not like to answer yes, sir, to that question as it was put to me.

(By the COURT, Judge BROWN:)

Q. Do you wish to correct your answer?

A. I wish to say that we treated it as the cargo of the party whom we insured.

(By Mr. McCARTHY:)

Q. That is what I asked you.

A. And you added "and paid;" that makes it entirely different.

Q. You would have paid people whom you had not insured?

A. I would upon the order of the assured.

(By the COURT, Judge BROWN:)

Q. The point I would like to know is, upon what preliminary authority you took possession of the cargo that was sunken?

A. It was under a custom prevailing in the management of the business.

Q. If the cargo was only slightly damaged you don't mean
82 that you take possession?

A. We do in cases of partial loss; yes, sir. It has been the custom when we hear of a loss, no matter how large or small, to send a man, or any party we choose to send, to protect the interests of the insurance company.

Q. Would you if there is a loss of ten per cent.?

A. Oh, no, sir.

Q. I asked you upon what preliminaries you took possession of this cargo.

A. Because we considered it a total loss, as far as the assured was concerned; that he would have a right to abandon.

Q. Upon what preliminaries do you act, if you know of any?

A. Under the custom in such cases that we always act under.

Q. Do you know whether there was any correspondence, a word of any kind, that passed between you and the agents of the company and any of the persons assured or interested?

A. Yes, sir. Mr. Morse came in and notified us with a telegram

that the boat was sunk. We immediately took steps to recover as much of that cargo as we could in both its sound and damaged condition. We went on upon that notice without anything further, assuming that the cargo would be abandoned, and accordingly we acted upon the mere notice that it was sunk.

(By Mr. McCarthy:)

Q. You have a gentleman in New York by the name of Matthews who is your agent?

A. Yes, sir; we acted through Mr. Matthews. Not all the preliminary arrangements were made here in New York; some
83 of them were. For example, Mr. Matthews employed the men that went and raised the cargo, and Mr. Matthews paid the money to Armour, Plankinton & Company. I don't remember whether he got this deed of cession and abandonment from Armour, Plankinton & Co. I didn't get it. I suppose Mr. Matthews got the proof of loss, too. If there was one he got it.

Q. What other preliminary arrangements were there that you attended to and that he did not?

A. We telegraphed to a party in Albany who has acted for us in similar cases to go and see to that cargo—that is, Mr. Austin; he went; and I think also to Mr. Kennedy, a gentleman in this locality where the boat was sunk.

Q. Do I understand you to say as an insurance dealer, agent, or what, not that you would give A an insurance on property whether he owned it or not, and then when the property had been constructively lost you would go and take it and sell it and keep the money, no matter whether A owned it or not?

A. We do that. I don't know as I have ever heard of anybody having the right to abandon cargo that had been insured, except the owner of it. I do not think anybody has got a right to abandon insured cargo or property except the person who owns it. I think the owner is the proper person to issue the abandonment.

Q. What inference would a man of ordinary common sense draw from this act—an insurance company accepting an abandonment from A—that A was the owner, wouldn't he?

A. Certainly.

Q. Did you ever hear of anybody abandoning property
84 who had not been insured?

A. No; abandoned property that had not been insured to whom?

Q. Did you ever hear of anybody abandoning property to an insurance company who had not been insured by the company?

A. No, sir; abandonment follows an insurance, but not in all cases.

Q. And the only person that can abandon is the person that has been insured, isn't it?

Objected to as a matter of law. Objection sustained.

Q. Don't you know that when this certificate of insurance was

issued that it was attached to the bill of lading and taken directly to Meadows, the agent of the owner?

A. No; I didn't know it. (Folios 138–149.)

Q. What was said, if anything, which would have led you to understand or infer that those boats were to have the benefit of that insurance, or this boat, the carrier boat, was to have?

A. Nothing was said in connection with it. I have had no conversation with anybody in particular in regard to these risks when taken, in regard to whom is benefited. What I was testifying to yesterday was my general understanding. I think my understanding would have special application to this case. It was my understanding and not anything that had special reference by contract or words to this case. (Fol. 150.)

(By Mr. McCarthy:)

Q. You say that if the carrier had been guilty of negligence and loss, from this cargo running against the bank or into an
85 island or into another boat, that there is nothing in your understanding that would have prevented the owner from holding for that loss?

A. The owner could hold him for the loss; yes, sir. That is the understanding. There is no understanding in Buffalo to the contrary.

Q. Is there any reason in the world—answer the question if you can, and if you can't, don't; I don't care—supposing the insurance company is subrogated to the owner, why can't the insurance company hold the carrier for his negligence? Is there any understanding to prevent that?

Objected to.

A. I think the company could hold the carrier; yes, sir; so far as the value of the boat. There is no understanding in Buffalo that I know of to prevent it. I don't know that I did mean to say yesterday that there was. Certainly I recognize the fact that a carrier has an insurable interest in the cargo and that an owner has. (Folios 153–4.)

Q. You never heard of an insurance company insuring both the carrier and the owner for one and the same premium and in the same certificate?

A. I don't know as—no; I don't think we have.

Q. Such a thing would be most absurd?

A. Yes; I don't think we have.

Q. Because the obligation of an insurance company to an insured owner would be entirely different from what it was to an insured carrier?

A. It amounts to about the same thing, so far as the insurance company is concerned.

86 Q. Let us see. In the first place, if you insure a carrier you don't get any subrogation—I mean ordinarily?

A. No, sir.

Q. Whereas if you insure an owner you always have a right of subrogation?

A. Yes, sir; and that is an important matter; it would make no difference in the premium.

Q. There are certain conditions in this policy. You say you did insure the several persons whose names are indorsed thereon as owner, advancer, &c., and on this particular case you waived it?

A. It says in there, or a book provided for that purpose; I put it in the book.

Q. You could have waived it?

A. We enter it in the book instead of the policy.

Redirect by Mr. HYLAND:

I know, as a matter of fact, that Messrs. Morse & Company act there as agents for boatmen in shipping grain; that is my understanding, that they act as agents for the captains of the boats; to what extent I can't tell. I understand that they receive commissions for acting as such agents in shipping grain. I understand that the premium that is paid to us comes from the captains. Before we paid this loss to Armour, Plankinton & Company we received from them the receipt for the loss and they presented the certificate; the certificate was delivered by them to us and that was the order on which we paid this money to Armour, Plankinton & Company. There was some particular average in this case of insurance.

87 Our policy says that in case of loss of any kind seventy-five dollars must be deducted as an average, and there is no claim unless it comes to that amount. The average is that provided for by the policy and it was settled accordingly; that was settled by Morse & Company.

Recross by Mr. MCCARTHY:

The sum of $75 was deducted out of the amount that we had insured. We paid so much less to whomsoever we paid. I do not know whether the captain in this case paid any premium at all or not. I only understand that he did. I don't know that he did. I know that in this case, as in any similar case, the premium was a lien against the cargo just as much as a canal toll. I don't know anything about whether the captain paid it or not. I understood that I would be subpœnaed by Morse & Co. to come here. I came at their request, but unwillingly.

The COURT (Judge Brown): I would like to ask this witness a few questions.

Mr. MCCARTHY: I suppose your honor will give me the right to except. I object to our company's being bound by any contract this man may have made that had not any consideration to support it.

By the COURT (Judge BROWN):

Q. How long have you been in this insurance business in Buffalo?

A. I have been as principal seventeen years, about. I entered

an insurance office in 1862. I have been acquainted with the transaction of business like that of Morse & Company about that time, during all the time. During that period I have been issuing insurance policies of this same character that I have stated
88 here, such as we call open policies in the beginning of the year, with a policy book, so termed, attached to the policy. There are other persons besides Morse there that follow the same business. There must be in the neighborhood of fifteen parties or twenty that are engaged in the same business as Mr. Morse, and they have been as long as I have been in the business—different parties from time to time—and long before that, too.

Q. The term "scalper" is a common name there given to persons in this business?

A. Yes, sir.

Q. In dealing with them and in issuing policies and insurance certificates of this kind what is the understanding of the company in regard to the ownership of the cargoes insured?

A. It is understood that we protect the carriers.

Q. I don't mean what you protect; I mean to the ownership—whether the scalpers are understood to be the owners or not to be.

A. They are understood not to be as a rule; in some cases they are the owner-. (Folios 155, 156.)

WILLIAM MEADOWS recalled.

(By the COURT, Judge BROWN:)

Q. Have you ever considered at all in what form the insurance effected in the way you have mentioned was to be made available as distinguished from the fact that it was to become available to the consignees?

A. I suppose the insurance was available only to the owners of the property; I never looked upon it in any other way.

(By Mr. MCCARTHY:)

Q. Did you contract with Morse & Co. to give them the benefit of that insurance or the boat the benefit?

A. No, sir.

89 Q. Did you intend to do so?

A. No, sir. (Fol. 178.)

HENRY MORSE, being duly sworn and examined as a witness for the claimant (in the Sydney suit), testifies:

(By Mr. HYLAND:)

Q. Where do you reside?

A. In Buffalo. I have resided there about thirty years. I am one of the members of the firm of H. Morse & Company. I am the senior member. The company is composed of myself and my brother. We have been doing business under the name of H. Morse & Company in Buffalo, I should think, about twenty-four or twenty-five years. During that time I have been constantly en-

gaged in the business in which I am now engaged. That business is loading canal-boats, taking freight, and loading boats on commission.

The COURT (Judge Brown): State in detail just how the business is transacted, just what you do.

A. When a boat comes to Buffalo and reports to us we get a load of freight by going to the grain receivers or grain owners and procuring the freight, and when we procure the cargo we go to the captain of the boat, arrange with him to put on the load, insure the boat, and charge it up to the captain. We insure the cargo. We make out an application and take it to the company, and they put it in our book which contains the policy. We take it to the company, and they enter it up on our book and give us a certificate. The company enter it in our book. When we clear the boat we get the captain's bill of lading, which we sign, too, pin the certificate to that bill of lading, and carry it to the party who gives us this cargo to carry.

90 (By Mr. HYLAND:)

Q. Whom do you insure and in what capacity do you insure when you get out the policy or certificate?

Objected to as a question of law.

The COURT (Judge Brown): I will allow you to prove the usual course of business, what they do in the usual course of business and what they did also in this particular instance.

Q. Who pays the premium for this insurance?

A. The captain of the boat. When we procure this insurance we act for the captain of the boat. The captain pays us a commission. The customary commission is five per cent. of the amount of the freight. Should the freight amount to four hundred dollars, it would be twenty dollars; three hundred dollars, it would be fifteen—that is, computed upon the freight from Buffalo to New York. In regard to the prior charges that we have to pay when there are charges, but we get no more for that. By paying I mean we advance it. I had a book account with the captain of the "Worden" in this case at the time this cargo was shipped. We are reimbursed for the prior charges that we advance, if we do so, by this commission that we charge—five per cent. on the amount of the freight. How do we get back the money? We make a bill of lading and make a draft on our agent in New York, and we put in this charge of the insurance and our commission and advances, and it is collected by our agent in New York when the cargo is delivered. It is collected by our agent from the consignee or owner of the grain.

91 The captain does not indorse our draft. The captain doesn't collect the whole amount himself, because he has had such a portion of the freight in Buffalo. We have to advance the money to run down with. The bill of lading is the voucher to the consignee to know how much to take out for the captain.

Q. (Handing witness a paper.) What paper is that?

A. That is a draft made.
Q. On this cargo?
A. I think it is; yes, sir.

Claimant's counsel offers the draft in evidence and it is marked Claimant's Exhibit D.

(By the COURT, Judge BROWN:)

Q. How is it that the captain doesn't collect the whole? How do you prevent the captain from collecting the whole amount?
A. By consigning him to an agent here; he goes to the agent, that agent collects the money from the——
Q. Consigning whom do you mean?
A. The captain. We give him a bill of lading, say, to an agent here; on that agent we make another bill of lading, putting in the amount of the advance, and add a draft for that amount of advances that the captain has in Buffalo.

(By Mr. HYLAND:)

Q. (Handing witness a paper.) What is that?
A. This is the bill of lading of the boat "Worden." This was issued and delivered at the time this cargo was shipped and is for this cargo which was lost. The endorsement on the back of this bill of lading was put on before it was given to the captain.

92 The paper is offered in evidence and is marked Claimant's Exhibit E.

(By the COURT, Judge BROWN:)

Q. Exhibit D is such a draft made upon our agents here?
A. Yes, sir.
Q. And is for this sum of $516, and that represented your advances and commissions and insurance premium in this case? In other words, it was what you were to be entitled to out of the earnings of this freight?
A. On the back of the bill of lading it is made up, copied from our book.

(By Mr. HYLAND:)

Q. How many does the captain sign of those bills of lading?
A. He signs one for the owner of the grain; I think he signs one only for us—one or two, I will not be certain which.

(By the COURT, Judge BROWN:)

Q. This is a different paper altogether from what is given to the shipper, Exhibit E?
A. Somewhat different.
Q. It isn't a copy, it is an independent paper that you have made out yourselves?
A. Yes, sir.
Q. And what was there in this case as between you and the captain that consigned the captain, as you say, to E. B. Vrooks & Com-

pany; there is no signature of the captain here? What signature of the captain have you got?

A. We have that on our boat book, which is at home. He signs the book we have at home; he signs the boat book. We do not send the boat book to our agent.

(By Mr. HYLAND:)

93 Q. What do you send with this draft to the agent here?

A. A bill of lading.

Q. Is it like this one?

A. It is similar to that.

(By the COURT, Judge BROWN:)

Q. Do you mean to say you send a copy of that same bill of lading that you give the shipper to anybody else?

A. We send not a regular copy of that, but something similar to it.

Q. I am speaking of that paper—either a duplicate or a copy?

A. Yes, sir.

Q. Do you send a duplicate or a copy?

A. Yes, sir; to our agent, through the bank.

Q. Signed by the master?

A. Signed by the master.

Q. Something different from this (Exhibit E)?

A. Something different. I don't think I have got that with me. I presume Mr. Brooke has got it in his office.

The COURT (Judge Brown): This paper (Exhibit E) would have no effect on the boat or captain?

Mr. HYLAND: The draft that goes with that to Mr. Brooke is an order to collect the draft.

(By Mr. HYLAND:)

Q. Who collects the freight down here?

A. Our agent, Mr. Bro-ke.

(By the COURT, Judge BROWN:)

Q. Why doesn't the captain get it if he wants it? What is there to prevent his getting it?

A. The bill of lading we give to Mr. Meadows. The advance is made up and put on that bill of lading, and on that bill of lading it is ordered to be paid to our agent, Mr. Brooke & Co.

Q. This is the part that you refer to in this corner (referring to the paper)?

A. Yes, sir.

94 (By Mr. HYLAND:)

Q. (Handing witness a book:) What bo-k is that you have in your hand?

A. This is our day book, where we enter up our boats.

Q. What account is that (on page 116)?

A. That is the account of the boat William Worden on that day,

May 18th, and the advances to said boat on that day as made up; the insurance, commission money advanced and owing, if any, and so forth. The expenses, charges, and freight for my bill of $516.95 consist of the following items: To Worthington & Sill, insurance, $14.82; commission, $19.75; Alanson Morse, cash, $240.26; cash, $34.74; William Meadows, $200. Our commission was five per cent. and the captain's charges were five cents a bushel, and it amounted to $395, making our commission $19.75. This system or plan of shipping has been practiced in Buffalo ever since I have been there, thirty years. During that time there have been quite a good many losses by sinking of cargoes in our business. They were all insured in the manner in which this cargo was insured. The certificates of insurance were sent out in the same way that this was.

Mr. McCarthy: I don't see how it is possible for this witness to give such testimony.

(By the Court, Judge Brown:)

Q. You are speaking of your own business?
A. I am speaking of my own business (folios 180–199).

(By the Court, Judge Brown:)

Q. Have you ever had any conversations with the insur-
95 ance people with reference to this class of insurance as to the persons covered or intended to be secured by it?
A. I have.
Q. In connection with taking out polices, I mwan?
A. Yes, sir; and it was understood that the captain of the boat was insured.

Mr. McCarthy: I must object to this answer.

(By Mr. Hyland:)

Q. Was it stated in substance to that effect?
A. It was stated in substance to that effect.

(By Mr. McCarthy:)

Q. Stated what?
A. That the captain of the boat was insured.

(By Mr. Hyland:)

Q. Did you or did you not state the capacity to the insurance companies' agent in which you acted during some of these times of conversation?

Objected to as leading.

A. I think I did.

Mr. McCarthy: That is not evidence (fol. 206).

Cross-examined by Mr. McCarthy:

The bill of lading showed to whom the cargo was consigned. When we got this bill of lading from Mr. Meadows we then under-

stood it was consigned to Armour, Plankinton & Company, but we didn't know who owned the grain; we did not know when we got the bill of lading. We knew who the consignees were. It is true, in a certain degree, that the reason why we got this policy originally on account of whom it may concern was because we did not necessarily or would not know the names of the owners. I am one of the bondsmen in this suit.

96 I am not interested to any great extent; I am on a bond. One of the boats proceeded against in this libel is the William Worden. At the time when she was proceeded against, a year ago last June, we were not the nominal owner; a man named Wager was the nominal owner, but my brother had a mortgage on the boat; not Morse & Company, only my brother had a mortgage on the boat; not Morse & Company, only my brother. I presume likely that mortgage was at that time overdue, but I do not know for a certainty. I should think the extent of that mortgage was then some $800. After the boat William Worden was damages by coming on these rocks, neither I nor my brother got her repaired. The insurance companies that had the insurance on the boat got her repaired. That was the Buffalo Insurance Company. The extent of those repairs was between nine and ten hundred dollars, I think. The interest of my brother in the boat was to the extent of this mortgage of eight hundred dollars. I believe it was a purchase-money mortgage. I won't be certain; I hardly think it was. That mortgage has been reduced down to four or five hundred dollars, I think. I became a bondsman for the Worden. I signed the bond as well as my brother. Speaking from the general course of our business, we consider ourselves in this transaction common carriers, together with the captain. Mr. Meadows, the shipper, was never brought in contact with the captain at all; never saw him. We applied to Mr. Meadows for the job, applied for a load to take to New York, or he applied to us for a boat; one or the other.

97 After our arrangements have been made with Meadows we simply got a boat, and did in this case. In this case we had the boat ready to load, and took the load for this boat. We had no particular reference to the Sydney in regard to this load. We undertook and agreed with Mr. Meadows to find transportation for his grain and get it insured. I think very likely Mr. Meadows made that special request of us, as he always or generally does. He asked me to insure it with Worthington & Sill. The agreement with Meadows was we were to be paid a certain sum for taking the cargo to New York and getting it insured. In this particular case the sum of five cents a bushel; it would not be so much as $516.94; five cents a bushel would be $395.

Q. Did five cents a bushel cover the cost of transportation as well as the cost of insurance?

A. It is always customary that the man taking the freight gets it insured, the man taking the cargo. That $395 stands for five cents a bushel. That is the cost of transportation.

Q. But in addition to that you undertook to insure, and that in

this particular case was fourteen dollars and some odd cents more, and that had to be added. It was more, wasn't it?

A. No, sir; it was not more. That was included in the $395, the insurance that the captain paid. The five cents a bushel was for transportation and insurance premium and was intended to cover both.

The COURT (Judge Brown): Now does it show in the day book?

Mr. HYLAND: $14.82—that is, in addition to the $395.

The WITNESS: No; it is not. It is out of the $395.

The COURT (Judge Brown) (examining the day book):
98 The book shows the gross amount of the freight $395, and then it shows certain charges, and the shipping bill sent to Morse shows the same aggregate charge deducted—that is, the insurance is deducted from the freight, which is the five cents a bushel.

Q. In other words, it comes to this: that for the $395, or five cents per bushel, you are to get the cargo transporte- to New York and to get it insured?

A. Yes, sir. The cargo is the foundation of the contract. Then, in addition to that, the $200 freight charges that we have advanced on the part of the cargo, or are about to advance, is put in the bill of lading, making, in all, $516.94, and this becomes a lien on the cargo. After that transaction was effected we paid over to Worthington & Sill fourteen dollars and some cents as premium. At the time we made this bargain with Mr. Meadows there was nothing said about ourselves or any other person having the benefit of that insurance.

Q. If it be true that either yourself or anybody else got any benefit out of that contract with Meadows, it must be a benefit that arises from custom in the port of Buffalo, must it not?

A. Well, we don't understand it so. I don't think that I communicated in that instance to the captain of the Worden that I had made any contract with Meadows for his, the captain's, benefit. When I went to Worthington & Sill, which was the same day, and got this certificate, I was doing it pursuant to the contract that I had just made with Meadows, and to protect ourselves and the captain. It was not immediately after
99 we got the certificate from the insurance company that we pinned it to the bill of lading and took it back to Meadows, not until the boat was loaded and the advances made up and the boat cleared. It was within a reasonable time; as soon as the figures had been ascertained. We did that pursuant to the contract that we had made with Meadows. When the loss occurred and the money had been paid over to Meadows or Meadows' principals we pretend that we had a right to that money so far as our interest was concerned—our interest as advancer—but no other right. Our interest as advancer amounted to $520. We don't pretend that our firm had any right whatever to the residue of the money that was paid to Armour, Plankinton & Company; we did not own the property. I don't think the captain of the boat had

any right to that sum of seven or eight thousand dollars that was paid to Armour, Plankinton & Company. There was no contract between us and Armour, Plankinton & Company or between us and Meadows that gave him the right to that money or any part of it. If there had been no insurance at all I should think there was nothing in the transaction between ourselves and Meadows that would have prevented Armour, Plankinton & Company from pursuing these boats to recover for the loss. I cannot say that there was anything in the contract with Meadows & Company that I know of that cut off the insurance company's right of subrogation that they would have upon paying Armour, Plankinton & Company.

Q. Now, will you be kind enough to tell me in what sense either yourself or the owner of that boat got the benefit
100 of that insurance.

A. With the understanding and the custom with the insurance company that ourselves, as common carriers, and the captain are protected when we take a policy from them, protected from any loss, protected against any loss that may occur while a cargo is in transit, after being insured, from Buffalo to New York or to any other port.

Q. How can that be true if, as you say, Armour, Plankinton & Company would have had the right to bring suit in case they had not been insured?

A. They were insured.

Q. But in case they had not been?

A. I do not know. I cannot say whether they really would have a right or not. I am not a lawyer and hardly supposed to know.

Q. Suppose a l-ss had occurred on the way to New York through the negligence of the boatman, through his gross negligence, would there have been such a protection?

A. I cannot say that there would.

Q. In other words, then, custom, understanding, or whatever else it may be, in Buffalo, does not protect the boatman from his own gross negligence, from the consequence of his gross negligence?

A. I don't know that it does.

Q. Or from his negligence?

A. I don't know that it will; I don't say that it would; I can't say that it would.

Q. (Handing witness Exhibit No. 3.) Please read that receipt. That is your receipt?

A. Yes, sir.

Q. Why did you say in this receipt that you transferred to the insurance companies all your claims and demands against the steamer Sydney or her owners arising from or connected with
101 said loss of cargo; why didn't you include the Worden also?

A. Well, that was handed to me on the payment of this amount of money; I didn't look at it particularly; supposed it was all right; I do not know that it is not all right now that I should have given such a receipt.

Q. I am not assuming at all that it was wrong in you to give it, but what I want to know is why you apparently assigned all your

claim against the Sydney. Why didn't you also include the Worden?

A. It is because—probably—simply because they didn't ask it.

Q. But it is your receipt.

A. Yes, sir; as it appears, they didn't put in the Worden.

Q. Did you at that time draw any distinction between the presumable liability of the Sydney and the Worden, because the Sydney was the towing boat?

A. I don't think it was spoken of at the time; it was not, to my recollection; I do not remember whether that was in my thought or my intention; I don't remember; I cannot say. I think the captain paid some money to us in Buffalo on the mortgage; that he paid my brother. The captain paid us no money on this shipment when we got the boat of him and put the cargo aboard. We are the ones who paid out all the money, and we advanced to the captain a sufficiency to pay his tolls and towing on the way to New York, and all those sums are included in this $516.94. I do not mean when I say the captain paid the premium that the money actually came from the captain's hands to ours. I mean just as it appears on the bill. Captain Wager owned the Sydney in this particular case, but another party had a claim
102 on the boat for about all she was worth, I think. That man is now dead; his name was Gillispie. We did understand that Captain Wager was going to tow the Worden with this steamboat Sydney to New York. While it was not agreed upon, it was understood by all that that was to be the case—that he was towing the Worden with the Sydney. I am prepared to say that I have never heard of any action similiar to this ever being brought against boats either by underwriter or by owners of cargo. I have never heard of any. I am not prepared to say that such suits have not been brought, but I have never heard of any. We do not get a rebate on this insurance premium. When the transaction is completed we make a draft on E. B. Brooks & Company in New York, through a Buffalo bank, for all the money that we have paid out, to wit, the $200 paid for back charged, fourteen dollars insurance premium, the money advanced to the captain for tolls and river towing, and our own commission. What is left to be paid to the captain in New York does not represent the reasonable compensation to a boat captain for one of those trips from Buffalo to New York. Probably he would only have a hundred dollars left in New York to collect. His freight amounts to $395. We take out this commission, the insurance, his tugging in Buffalo, if any, the trimming of the load, which we paid for him, and then we may give him a hundred and fifty or two hundred dollars, and he might have a hundred dollars to collect in New York, or we might give him this two hundred, and he might pay on his boat, which I see in this case he did, paid $240 on the boat Worden, and only took thirty-four dollars and some
103 cents to run down with on this boat. How much he took on the Sydney I don't know. This $395 is subject to deductions for trimming and our commissions and canal tolls, and so forth. If it were not subject to these deductions it wouldn't be so large; the

owners wouldn't have to give so much. We do not as a general thing in Buffalo get two certificates of insurance on one of these shipments—one to cover the cargo owner and one to cover ourselves for advances. It is sometimes done—some other parties do it—because the bank requires a certificate for these advances, and some other parties do do it; we hardly ever do it when dealing with such men as Mr. Meadows, but it may be done sometimes and may not be. It is only done where the bank wants further security from the scalper; that is it. I say that certificates have sometimes been returned to us. When I say we have collected from the insurer I do not mean the certificates that represent our advances. We have sometimes had the main certificates. I cannot say for a certainty that we have so dealt with the Providence & Washington Company, and I cannot say that we have not. We have no voice in the running of the boat after the cargo is loaded.

Redirect.

By Mr. HYLAND:

Q. Mr. Meadows received the signature of the captain to the shipping bill which you signed for Mr. Meadows. Was Mr. Meadows present when he signed that, or where is that signed?

A. It is signed in our office; he was not present, but the shipping bill is signed and sent to him after it is signed by the captain,
104 so that the shipping bill is signed to us and the captain both, which is made with Mr. Meadows. Then there is no other agreement between us and Mr. Meadows and the captain and Mr. Meadows except that bill. That is all there is to it.

Q. Of course, Mr. Meadows knows that you are representing the boatmen in getting the load?

A. Yes, sir.

Mr. MCCARTHY: He may not know what Mr. Meadows knows.

The WITNESS: I am willing to admit I do not.

Q. When you ship grain in this way as a common carrier or agent or acting in both capacities do you ever ship without insuring your cargo?

A. We never do.

Q. Never do. You always insure your cargo?

A. Yes, sir. (Folios 211-245.)

HENRY MORSE further examined.

(By Mr. HYLAND:)

Q. In answer to a question put to you by Mr. McCarthy yesterday you stated that you had interest only in that part of the money which was paid to you, and that you had no interest in the money paid to Armour, Plankinton & Company, or words to that effect. What did you mean by that answer?

Objected to as calling for the witness's construction. Objection overruled.

Q. That the money that was paid to Armour, Plankinton & Company was on the loss. They being owners of the grain, that portion of the money would go to them, we receiving the amount of our advances out of the loss, and the balance of — money belonging to the owner, as we understand it, should go to them. (Folios 282–'3.)

105 And also the following exhibits, viz:

LIBELLANTS' EXHIBIT NO. 3.

(Organized 1779.)	(Organized 1841.)
Providence Washington Ins. Co. Providence, R. I.	Security Insurance Company. New Haven, Conn.

New England underwriters.

Inland marine department.

Worthington & Sill, gen'l ag'ts.

BUFFALO, *June 30th*, 1883.

Received of Worthington & Sill, gen'l agents of the Providence Washington Ins. Co. of Providence, R. I., and the Security Ins. Co. of New Haven, Conn., comprising the New England underwriters, five hundred and twenty (520) dollars, in full payment of all claims for loss on our interest in the cargo of wheat of boat "Wm. Worden," sunk in the Hudson river on or about May 29th, 1883; and for and in consideration of such payment, we, H. Morse & Co., hereby assign and transfer to these companies all claims and demands against the steamer "Sydney," or her owners, arising from or connected with said loss of said cargo, and these companies are hereby subrogated in the place of and to said claims or demands of said H. Morse & Co. against said steamer "Sydney," or her owners, to the extent of their interest insured by said companies.

H. MORSE & CO.

106 LIBELLANTS' EXHIBIT NO. 4.

Agreement, made and entered into this 26th day of June, 1883, between Armour, Plankinton & Co., of New York city, of the first part, and the Providence Washington Insurance Company, of Providence, Rhode Island, and the Security Insurance Company, of New Haven, Connecticut, of the second part, witnesseth:

Whereas, on the 17th day of May, 1883, by one certain policy of insurance, the said parties of the second part became the assurers of the said party of the first part upon a cargo of wheat on board the boat "William Worden," whereof Charles E. Wager was master on her late voyage from Buffalo to New York; and whereas detriment and loss having accrued to the said insured property by reason of some of the perils in the said policy mentioned and described, the said parties of the first part have ceded and abandoned to the said

parties of the second part the said insured property and all their interest therein.

And whereas the said parties of the second part have accepted the said cession and abandonment, and have therefore paid to the said parties of the first part the sum of nine thousand two hundred and eleven $\frac{75}{100}$ dollars, in full satisfaction of the sum by the said policy insured.

Now, this agreement witnesseth, that the said parties of the first part, in consideration of the sum paid as aforesaid, which payment is hereby acknowledged, have ceded and abandoned and set over unto the parties of the second part aforesaid, and their assigns, the aforesaid cargo of wheat and all the right, title and interest of the parties of the first part thereunto. And the parties of the first part hereby release and discharge the parties of the second part and their successors from any claims and demands whatsoever, by reason of the policy of insurance hereinabove mentioned.

107 And the said parties of the first part hereby constitute and appoint the said parties of the second part their attorneys, irrevocable, to sue for, recover and receive the said cargo of wheat and all moneys thence arising, and all damages of and concerning the same, either in the names of the said parties of the first part or in their own proper names, to wit, that of the party of the second part.

Witness the hands and seals of the parties of the first part the day and year first above written.

ARMOUR, PLANKINTON & CO. [L. S.]

In presence of—
U. C. WHITLOCK.

108 Claimant's Exhibit A is as follows:

Uniform Canal Cargo Policy.

The New England underwriters.

The Security Insurance Co., of New Haven, Conn.; the Providence Washington Ins. Co., of Providence, R. I.,

Each acting and contracting for itself, and not one for the other, for the true performance of the premises; each company for its own part only, which is one-half of all liability accruing under this policy,

By this policy of insurance,

On account of H. Morse & Co., for whom it may concern:

Do insure the several persons, whose names are hereafter endorsed hereon as owner, advancer, or common carrier on goods, wares, merchandise or country produce, on his own boat, or boats belonging to others, loaded on commission or chartered.

From place to place, as endorsed hereon or in a book kept for that purpose, for the several amounts, at the rate, and on the goods,

wares, merchandise, or country produce, as specified in the said endorsement.

No risk considered as insured under this policy, until said endorsement is approved and signed by these companies, or their duly authorized agents, at ——, unless with special agreement with the companies and endorsed hereon.

Beginning the adventure upon the goods, wares, merchandise or country produce, from and immediately following the lading thereof, at the port or place endorsed as aforesaid, and continuing the same until the said goods, wares, merchandise or country produce shall be safely landed at the port of destination as aforesaid. And it shall and may be lawful for the said boats to load in such a manner as is usual and customary for vessels employed in the navigation aforesaid to be laden; without reference to any provisions on the same subject on marine law or custom applicable to vessels laden for sea voyages. Five days allowed to discharge after arrival. No insurance to apply more than three days after lading, while the boat is in port in which she is laden.

Touching the adventures and perils which the said insurance companies are contended to bear and take upon themselves on said trip or voyage they are of the seas, canals, rivers and fires, and all other perils, losses or misfortunes that shall come or happen to the hurt, detriment or damage to the said goods, wares, merchandise or country produce, laden on board of said boats on the voyage or trip aforesaid. Excepting perils, losses and misfortunes arising from or caused by ice, jettison, theft, robbery or barratry of the master or any of the crew of said boats, or from a want of ordinary care and skill (such as is common in said navigation), in lading or navigating said boats, and excepting also all losses arising from or caused by the said boats being unduly laden on the voyage or trip aforesaid.

It is hereby expressly understood and agreed that these companies will not be liable for loss or damage to any cargo during the loading of boat resulting from lack of proper caulking; nor for any loss or damage resulting from the spilling of cargo by careening of boat in consequence of carelessness or overloading.

Specie, bullion, jewels, bank notes or bills of exchange, deeds, bonds, mortgages, accounts, and all other evidences of debt; plate, medals, paintings, powder, piano-fortes, statuary, sculptures and curiosities, are not deemed to be included in any insurance, unless specially mentioned in the policy, and scheduled.

In case of loss or misfortune, it shall be the duty of the captain and crew, or those having command, to use the utmost diligence and attention to save the property until some agent of these companies shall arrive, and upon his arrival to assist him in the care and saving of the property, and neglect to do so will render the policy void; and it is understood there can be no abandonment of the subject insured; nor shall the acts of the insurers or their agents, in recovering, saving, or disposing of the property hereby insured, be considered a waiver or an acceptance of abandonment, nor as affirming or denying any liability under this policy; but such acts

shall be considered as done for the benefit of all concerned, without prejudice to the rights of either party.

Immediate notice of the occurrence of all losses shall be given to these companies by the insured; and within thirty days from the time the same may happen, the said insured shall deliver to said companies as particular an account thereof as the nature of the case will admit, stating the causes, if known, the extent thereof, and the nature of the interest of assured in the property, also what other insurance or insurances (if any) there was on said property at time of said loss, which statement shall be in writing, signed by the assured, and verified by his or their oath; and so much of said statement as relates to the cause, nature and extent of said loss or damage, shall be verified also by the oath of the master of said boat or vessel, or of some other person or persons having immediate charge thereof at the time the same did happen, otherwise these companies will not be liable under this policy; and the amount of loss shall be ascertained by the opening of packages, when
111 necessary, by a competent person, and separating the sound from the damaged portion, these companies being liable for the loss on the damaged portion only, which shall be ascertained by appraisement by disinterested persons, or by sale at auction, as these companies may prefer.

The said loss or damage to be estimated according to the true and actual cash value of the said property at the place of destination on the day of the disaster; and on the property not forwarded to its destination the said loss or damage to be ascertained in the same manner, and the freight from the place of the disaster to the place of destination deducted, and these companies will pay such proportion of the said loss as the amount hereby insured bears to the sound value of property so insured, to be paid within sixty days after notice and proof of the loss, and interest thereon shall have been made by the insured. In all cases of loss or damage there shall be deducted, in lieu of average, the sum of seventy-five dollars on losses on grain and general merchandise, and fifty dollars on flour and other cargoes, excepting salt, on which the average shall be one hundred dollars.

In case of loss all unpaid premiums to be deducted.

In the case of wet grain, the dry portion in the boat (if any) to be considered as a sample of the condition and quality of the cargo when shipped.

No claims to be paid for damage to cargo from leakage through the decks or other coverings of the boat. It is also agreed that these companies shall not be liable for any loss or damage to bar, bundle, rail, rod or hoop iron, unless total; nor for damage to goods or property on deck, unless by special agreement in writing endorsed on this policy. This policy shall not cover loss or damage resulting from explosion of gunpowder, from acids, lime or matches. No loss to be paid for detention of boat or cargo, or demurrage.
112 It is understood and expressly agreed, that this policy does not cover any damage from ice, and if the voyage is suspended or interrupted in consequence of ice for three consecutive

days, or more, the trip risk shall cease and terminate, at and from 12 o'clock at noon of the day the boat is stopped by ice; and in case the navigation of the canal shall during the trip be closed officially, while the boat is on the canal, the risk under this policy shall cease on the day the navigation is thus closed, three days, however, next succeeding such stoppage and closing, shall be allowed to discharge cargo, but any resumption of the voyage during the same season, or the spring following, shall not revive the risk or restore the liability of these companies under this policy. The premium charged on any risk terminated by either of the above causes shall be considered, notwithstanding, as fully earned.

And provided further, and it is hereby agreed, that if the said insured shall have already made any other insurance upon the premises aforesaid, not notified to these corporations, and mentioned in or endorsed upon this policy, then this insurance shall be void and of no effect; and in case of any other insurance on the premises hereby insured, whether prior or subsequent to the date of this policy, the insured shall not, in case of loss or damage, be entitled to demand or receive of these companies any greater portion of the loss or damage sustained than the amount hereby insured shall bear to the whole amount insured on the said premises.

And it is further provided, and hereby agreed, that if the said boats upon a regular survey shall be deemed unseaworthy or unfit to prosecute said voyage or trip on account of rottenness or unseaworthiness, then the said companies shall not be liable to make good any loss under this policy. And it is understood that no loss is to be paid arising from any neglect in not keeping the boat well
113 pumped out except in case of accident. And it is also further provided, that the said boat shall at all times during the continuance of this policy, be tight, and well found in anchors, cable, rigging, tackle and apparel, as is usual and customary; also, in all other things and means necessary and proper for the safe navigation thereof, according to the usage and custom; and that whenever said vessel shall lie at anchor in the night-time, she shall show one or more lights in a conspicuous place, so as to warn and give notice to approaching vessels.

And further, should any loss or damage under this policy be occasioned by any other vessel, person or persons, in such a manner that such other vessel, or the owners thereof, or such person or persons, shall be liable therefor, then all claims for such loss or damage shall be assigned over to these companies and shall inure to their benefit, in proportion to the amount of such loss sustained by them; that is to say, the amount of such loss shall be satisfied and paid out of what shall be recovered by such claims, in the same proportion (according to the amount) as the losses sustained by other sufferers shall be paid out of said recovery.

This policy may be assigned: Provided, that before any loss happens, notice shall have been given to these companies of such assignment, otherwise the companies shall not be bound to pay any loss upon this policy. And provided further, that the said companies when so notified, shall be at liberty to return a ratable proportion

of the premium, and thereupon be exonerated from their responsibility by virtue of this policy, and the same shall cease and be of no further effect.

Losses and averages to be adjusted and sett-ed on each voyage separately, and all differences may be submitted to the judgment of arbitrators, indifferently chosen, whose awards shall be bind-
114 ing on the parties; and in case these companies require it, they shall be so submitted. It is furthermore hereby expressly provided, that no suit or action against said companies for the recovery of any claim upon, under or by virtue of this policy shall be sustainable in any court of law or chancery, unless such suit or action shall be commenced within the time of twelve months next after said loss or damage shall occur; and in case any such suit or action shall be commenced against said companies after the expiration of twelve months next after such loss or damage shall have occurred, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim thereby attempted to be enforced.

In witness whereof, the presidents of the Providence Washington Insurance Co. and Security Insurance Co. have hereunto subscribed their names and caused the same to be attested by their secretaries, this — day of ——, A. D. 188–.

CHAS. PETERSON, *President.*
H. MASON, *Secretary.*
} Security Insurance Co.

J. H. DE WOLF, *President.*
J. B. BRANCH, *Secretary.*
} Providence Washington Insurance Co.

This policy will *be* not be valid unlesss countersigned by their duly authorized agent, at ——.

Countersigned by —— ——, *Agent.*

(Edition C.)

115 The bill of lading is as follows:

LIBELLANTS' EXHIBIT 1.

No. —.

(Vignette.)

BUFFALO, *May* 17, 1883.

Shipped by W. Meadows, in apparent good order, on board the canal-boat "Wm. Worden," of Morse, whereof —— —— is master, the following-described property, to be transported to place of destination without unnecessary delay, and to be delivered as addressed on the margin, in like good order, in the customary manner, free of lighterage, upon payment of freight and charges as prescribed in

this bill. Consignees to pay all harbor-towing from and to the usual place of landing. Three week days, regardless of weather (including day of arrival, providing notice of arrival shall be given before four o'clock p. m.) after arrival and notice of same, to be allowed consignees to discharge this cargo, after which time the cargo or consignees are to pay demurrage at the rate of two and one-half per cent. per day upon the freight, including tolls, for each and every day of such demurrage over the three days as above specified, until the cargo is fully discharged. And it is agreed between the carriers, and shippers and assigns, that in consideration especially of the rate of freight hereon named, the said carriers having supervised the weighing of said cargo in board, hereby agree that this bill of lading shall be conclusive as between shippers and assigns and carriers, as to quantity of cargo received in board and to be delivered at port of destination, and that they will deliver the full quantity hereon named. All damage caused by the boat or carrier, or deficiency in the cargo from quantity as hereon specified, to be paid for by the carrier and deducted from the freight, and any excess in the cargo to be paid for to the carrier by the consignee. In
116 case grain becomes heated while in transit, the carrier shall deliver his entire cargo and pay only for any deficiency caused by heating by exceeding five bushels for each one thousand bushels.

The freight, charges, and demurrage payable to as directed below or order, at place of destination, who is the only party authorized to collect the same, and whose receipt shall be in full for all demands on this cargo or bill of lading.

In witness whereof, the said master of said boat hath affirmed to two bills of lading, one marked "original" and one marked "duplicate," of this tenor and date, one of which being accomplished, the other to stand void.

ARMOUR, PLANKINTON & CO., *New York.*

7,900 bu. No. 2 red wheat, ex cargo, schr. R. Hallaran.
Freight to New York, five (5) cents per bu.
Advanced charges, 200.00.

H. MORSE & CO.,
Per C. E. WOLFE.

(Seventy-nine hundred bushl.)

C. E. WAGER.

The freight charges and demurrage, to the amount of $516.94 are payable by check to the order of the National Bank of the Republic, in New York, such check to be delivered to E. B. Brooke & Co., for such bank; the balance is payable to said E. B. Brooke & Co., who is the only party authorized to collect the same, whose receipts shall be in full for all demands therefor.

(New.)
(Eb. 28.)

Printed across face in red ink the word, "original."
Endorsed: Armour, Plankinton & Co., Whitlock.

117 Application is as follows:

CLAIMANT'S EXHIBIT B.

Worthington & Sill, general agents, New England underwriters canal insurance. Office, No. 48 Main street, and 10 Dayton street, Buffalo, N. Y.

(Copy.)

Insurance is wanted by H. Morse & Co. Loss, if any, is payable to do. or order, on wheat inboard cargo of boat "Wm. Worden," $9,875 from Buffalo to New York.

Rate — cts. is ---------- $

Total premium ---------- $

Buffalo, May 17, 1883.

H. MORSE & CO., *Applicant.*

118 On receipt of this application Messrs. Worthington & Sill, the libellants' general agents, issued and delivered to H. Morse & Co. a certificate of insurance, of which the following is a copy:

LIBELLANTS' EXHIBIT No. 2.

Providence Washington Ins. Co., Providence, R. I. Security Ins. Co., New Haven, Conn.

New England underwriters, Inland marine department. Worthington & Sill, gen'l agents, Buffalo, N. Y.

No. 668. *Canal Cargo Certificate.* $9,875.

This certifies that H. Morse & Co. insured under and subject to the conditions of policy No. 772, issued by the New England underwriters, in the sum of ninety-eight hundred seventy-five dollars, inboard cargo of boat Wm. Worden.

On wheat, $9,875, at and from Buffalo to New York, —— to ——.

Loss (if any) payable to assured or order and return of this certificate.

This certificate of insurance is not valid until countersigned by the authorized agents for this company at Buffalo, N. Y.

Buffalo, N. Y., May 17th, 1883.

WORTHINGTON & SILL,
General Agents.

Written across face in red ink:

Received, New York, June 26th, 1883, from New England underwriters ninety-two hundred eleven $\frac{75}{100}$ dollars in full for all loss

and damage under this certificate, which is hereby surrendered and annulled.

$9,211.75. ARMOUR PLANKINGTON. WHITLOCK.

Endorsed: H. Morse & Co.

119 CLAIMANT'S EXHIBIT E.

No. —. BUFFALO, *May* 18, 1883.

Shipped by H. Morse & Co., in apparent good order, on board the canal-boat "William Worden," of Syracuse, whereof Charles E. Wager is master, the following-described property, to be transported to place of destination without unnecessary delay, and to be delivered as addressed on the margin, in like good order, in the customary manner, free of lighterage, upon payment of freight and charges as prescribed in this bill.

Consignees to pay all harbor towing from and to the usual place of landing. Three week days, regardless of weather (including day of arrival, providing notice of arrival shall be given before four o'clock p. m.), after arrival and notice of same, to be allowed consignees to discharge this cargo, after which time the cargo or consignees are to pay demurrage at the rate of two and one half per cent. per day upon the freight, including tolls, for each and every day of such demurrage over the three days as above specified, until the cargo is fully discharged. And it is agreed between the carriers,
120 and shippers and assigns, that in consideration especially of the rate of freight hereon named, the said carriers having supervised the weighing of said cargo inboard, hereby agree that this bill of lading shall be conclusive as between shippers and assigns and carriers as to quantity of cargo received inboard and to be delivered at port of destination, and that they will deliver the full quantity hereon named. All damage caused by the boat or carrier or deficiency in the cargo from quantity as hereon specified to be paid for by the carrier and deducted from the freight, and any excess in the cargo to be paid for to the carrier by the consignee. In case grain becomes heated while in transit the carrier shall deliver his entire cargo and pay only for any deficiency caused by heating exceeding five bushels for each one thousand bushels.

The freight, charges, and demurrage to the amount of $—— are payable by check to the order of —— ——, New York, such check to be delivered to —— ——, for such bank, the balance payable to said —— ——, who is the only party authorized to collect the same, whose receipt shall be in full for all demands therefor.

Tolls on this cargo having been advanced by H. Morse & Co., if refunded, must be to them or to their order.

In witness whereof the said master of said boat hath affirmed to two bills of lading, one marked "original" and one marked "duplicate," of this tenor and date, one of which being accomplished, the other to stand void.

121 7,900 bushels of wheat. Freight to New York, per bushel, 5 ..... $395 00
Captain's advance 319 44

On safe delivery, E. B. Brooke & Co. collect as above and pay captain $75 56
Hold subject to our draft 319 44

H. MORSE & CO.
FERO.

Care E. B. Brooke & Co., New York.

J. W. SCHLEHR, *Dep. Clerk.*

(Endorsed.)

Insurance	$14 82
Commission	19 75
Trimming	9 87
Cash	34 74
H. Morse	240 26
	319 44

122 CLAIMANT'S EXHIBIT D.

H. Morse & Co.

$516.94. BUFFALO, N. Y., *May* 18, 1883.

Pay to the order of J. W. Bridgman, cashier, five hundred and sixteen $\frac{94}{100}$ dollars, fifteen days after date; or if you shall sooner collect freight and charges on canal-boat "William Worden," then pay said sum immediately thereafter. A bill of lading of such boat is placed in your hands, bearing date May 17, 1883, for the express purpose of enabling you to meet this draft.

H. MORSE & CO.
J. FERO.

To E. B. Brooke & Co., New York.

Protest for non-acceptance only.

Printed across the face in red ink:

— accept this draft and agree to pay the amount named as therein directed, at the ——.
(Signed) E. B. BROOKE & CO.

Thereafter and after time taken for consideration the circuit judge filed with the clerk of the circuit court the following decision and findings of fact and conclusions of law as found by the court:

123 THE PROVIDENCE WASHINGTON INSURANCE COMPANY *et al.*, Appellees,
vs.
MORSE *et al.*, Appellants.

WALLACE, *J.*:

As stated in the opinion of Judge Coxe in the district court in this case, the facts are essentially the same as those which appeared in the case of the Sydney. The testimony as to conversations about the insurance, which took place in 1883, and were not brought to light in the former litigation between the parties, is entitled to slight consideration. The district judge, however, has misapprehended the purport of the opinion in the case of the Sydney respecting the extent to which the benefit of the insurance inured to Morse & Co. They were insured for their whole interest in the cargo, not merely to the extent of their interest in the freight, but as carriers who had contracted for the safe delivery of the cargo. Consequently, they are entitled equally with Armour, Plankinton & Co. to the benefit of any payment by the insurers on account of the loss, and there can be no recovery against them upon the theory of subrogation.

Indorsed: Mem. of decision. Wallace, J. Filed Feb. 22*d*, 1889. W. S. Doolittle, clerk.

124 U. S. Circuit Court, Northern District of New York.

THE PROVIDENCE WASHINGTON INSURANCE COMPANY OF PROVIDENCE, Rhode Island, and The Security Insurance Company of New Haven, Connecticut, Libellants and Appellees,
vs.
HENRY MORSE, ALANSON MORSE, and CHARLES E. WAGER, Respondents and Appellants.

Findings of Fact and Conclusions of Law.

(1.) Prior to the 17th day of May, 1883, the libellants, who were foreign corporations carrying on the business of general marine insurance under the name of the "New England Underwriters," having an office at Buffalo, New York, issued and delivered to the firm of H. Morse & Co., composed of the defendants Henry Morse and Alanson Morse, of Buffalo, New York, a policy of insurance reciting that "On account of H. Morse & Co., for whom it may concern, they do insure the several persons whose names are hereafter indorsed on the policy as owner, advancer, or common carrier of goods, merchandise, or produce on his own boat or boats belonging to others, loaded on commission or chartered, from place to place, as indorsed hereon or in a book kept for that purpose, for the several
125 amounts, at the rate, and on the goods, merchandise, or produce as specified in the indorsement, beginning the adventure upon the goods, merchandise, or produce from and immediately

following the landing thereof at the port or place of the endorsement and continuing the same until the goods, merchandise, or produce shall be safely landed at the port of destination." The policy, among other things, excepted from the risk all losses arising from want of ordinary care and skill in loading or navigating the boats.

(2.) On the 17th day of May, 1883, Morse & Co. applied to the agent of the libellants at Buffalo for insurance upon a cargo of wheat to be carried on the canal-boat William Worden from Buffalo to New York, and requested the loss, if any, to be made payable to Morse & Co. or order. Thereupon the agent of the libellants entered in the book a memorandum designating Morse & Co. as the persons on whose account insurance was effected, describing the boat, cargo, and voyage, and specifying the amount insured upon the cargo on the voyage from Buffalo to New York as $9,875.00, and the premium as $14.82. At the same time the agents of the libellants delivered to Morse & Co. a certificate certifying that Morse & Co. were insured, under and subject to the conditions of the policy before mentioned, in the sum of $9,875.00, on cargo of wheat on board boat William Worden from Buffalo to New York, loss, if any, payable to assured or order.

(3.) At the time when the foregoing policy and certificates were executed and issued by the libellants Mors- & Co. were doing
126 business at Buffalo as intermediaries between boatmen and shippers of cargo in procuring cargoes to be shipped for a commission. They were applied to by the owner of the canal-boat Worden to procure him a cargo for New York. They thereupon applied to one Meadows, who was an agent for Armour, Plankinton & Co., for a cargo and agreed with him to transport 7,900 bushels of wheat from Buffalo to New York on the boat Worden and to insure the same for a freight of five cents per bushel. Thereupon they entered into a contract with the owner of the Worden, evidenced by a bill of lading, in which they were described as shippers of the cargo, for transportation of the cargo to New York and procured the certificate of insurance aforesaid and endorsed and delivered to *to* the agent of Armour, Plankinton & Co., and at the same time entered *ihto* a contract with him for the transportation of the cargo to New York, evidenced by a bill of lading, in which they described themselves as carriers and Armour, Plankinto*j* & Co. as shippers. The agreement for transportation between Armour, Plankinton & Co. and Morse & Company was as follows: (Insert bill of lading, Libellants' Exhibit 1.) The agreement made between Morse & Company and the master of the Worden was as follows: (Insert Claimant's Exhibit E.)

(4.) At the time Morse & Co. executed and delivered the bill of lading to the agent of Armour, Plankinton & Co. the claimant, as master of the Worden, also executed a duplicate bill of lading, describing himself as carrier, and delivered it to said agent. The first-named bill of lading was signed also by the master of the Worden.

127 (5.) By the agreement for the transportation of the cargo between Morse & Co. and Wager, the boat-owners, the latter

was to receive five cents per bushel as freight less the amount to be paid as premium for insuring the cargo and less a commission of five per cent. upon the whole freight money to Morse & Co.

(6.) Morse & Co. advanced to the agent of Armour, Plankinton & Co. $200 for prior advances made by the agent upon the wheat, and by the bills of lading the cargo was to be delivered upon payment of this advance and the freight.

(7.) Pursuant to the contract made between Meadows, the shipper and agent of the cargo-owners, on the one hand, and Morse & Co., the carriers, on the other hand, the latter agreed and undertook, for and in consideration of the payment of $395, the payment of which was made a lien on the cargo, to transport the same to New York and to insure the owners' interest in said cargo.

(8.) Immediately after this contract had been made between Meadows, the shipper, and Morse & Co., the carriers, the latter employed the co-respondent Wager to carry the cargo in the two boats, the Sydney and Worden, to New York.

(9.) Heretofore, to wit, on and before the 29th day of March, 1887, there was pending in the circuit court of the United States for the southern district of New York, to which it had been removed
128 from the district court of the same district by appeal, a cause of action *in rem* instituted by these libellants against the boats Sydney and Worden, wherein process had been duly issued against said vessels.

That cause of action arose out of the same facts as is set forth in the libel herein.

In that action the respondent Wager duly intervened and claimed the two vessels, and the respondents Henry Morse and Alanson Morse became sureties for the "Worden" and for claimant's costs.

The circuit court aforesaid decreed that the two vessels be condemned in favor of the libellants.

(10.) An essential fact in the proceeding and judgment aforesaid was that the cargo-owners had been insured to the extent of the value of the cargo, and that the libellants herein had been subrogated to the said owners' rights of action against the carriers.

(11.) In the proceeding and judgment aforesaid it was also found that the carriers had been guilty of negligence in their management of the boats aforesaid on the voyage aforesaid.

(12.) At the time of making application for the insurance, receiving the certificate, and signing the several bills of lading it was understood between Morse & Co. and Wager that the latter owned the Worden and the Sydney and intended to tow the Worden by the Sydney on the voyage.

129 (13.) Upon the voyage the Worden was wholly under the control of the Sydney and both boats were navigated as one vessel practically, and on the twenty-eighth day of May, 1883, while proceeding on the voyage down the Hudson river, the Worden struck the rocks on Esopus island and sunk and her cargo was damaged to the amount of $6,175.89. These were well-known rocks, easily avoidable by vessels.

(14.) June 26, 1883, the libellants paid to Armour, Plankinton & Co. the sum of $9,211.75 on account of the loss of the cargo insured and upon an abandonment by the owners to the libellants, and about the same time they paid Morse & Co. the sum of $520 in full for their interest in the cargo.

(15.) The respondents herein, Charles E. Wager, Henry Morse, and Alanson Morse, were the carriers of the cargo aforesaid, and, as such, personally liable for its due transportation and delivery to its owners. They signed the bill of lading under which the cargo was received for transportation and their liability reposes on the same facts as did the liability of the boats Sydney and Worden.

Conclusion of Law.

(1.) The libellants are entitled to a decree in the sum of $6,175.89, with interest from May 28, 1883, with costs of this court and of the district court as against the appellant Wager.

130 (2.) The appellants Henry Morse & Alanson Morse are entitled to a decree against the libellant dismissing the libel, with costs of the district court & of this court.

WM. J. WALLACE.

Indorsed: Findings. Wallace, J. Filed Feb. 22, 1889. W. S. Doolittle, clerk.

The counsel for the respondent Wager duly filed the following exceptions to said findings of fact and conclusion of law:

131 Circuit Court of the United States, Northern District of New York.

THE PROVIDENCE WASHINGTON INSURANCE COMPANY OF PROVIDENCE, Rhode Island, and The Security Insurance Company of New Haven, Conn., Libellants and Appellees,
vs.
HENRY and ALANSON MORSE, Copartners, and CHARLES E. WAGER, Respondents and Appellants.

The respondent and appellant Wager hereby excepts to the findings of fact and conclusions of law found and filed in the office of the clerk of this court on the 22d day of February, 1889, by the Honorable William J. Wallace, judge of the above-entitled court, as follows:

Exceptions to Findings of Fact.

First. The respondent Wager excepts to the third finding of fact in so far as it finds that H. Morse & Co. alone agreed with Meadows to transport 7,900 bushels of wheat from Buffalo to New York on the boat Worden and to insure the same for the freight of five cents per bushel. It should be that H. Morse & Co. and Charles E. Wager agreed with said Meadows to transport said 7,900 bushels of wheat;

and also excepts to the said third finding in so far as it finds that
132 " and procured the certificate of insurance aforesaid and endorsed and delivered it to the agent of Armour, Plankinton & Co., and at the same time entered into a contract with him for the transportation of the cargo to New York, evidenced by a bill of lading in which they describe themselves as carriers and Armour, Plankinton & Co. as shippers." It should be: " And procured the certificate of insurance aforesaid and endorsed and delivered it to the agent of Armour, Plankinton & Co., and at the same time said Morse & Co. and Charles E. Wager entered into a contract with him for the transportation of the cargo to New York, evidenced by a bill of lading in which they (H. Morse & Co. and Charles E. Wager) describe themselves as carriers and Armour, Plankinton & Co. as shippers."

Second. The respondent Wager excepts to the fourth finding of fact, which reads: " At the time Morse & Co. executed and delivered the bill of lading to the agent of Armour, Plankinton & Co. the claimant, as master of the Worden, also executed and delivered a duplicate bill of lading, describing himself as carrier, and delivered it to said agent. The first-named bill of lading was signed also by the master of the Worden." It should be: " The bill of lading executed and delivered to the agent of Armour, Plankinton & Co. was signed by H. Morse & Co. and Charles E. Wager as carriers."

Third. The respondent Wager excepts to the seventh find-
133 ing of fact, in so far as it finds: " For and in consideration of the payment of $395, the payment of which was made a lien on the cargo, to transport the same to New York and to insure the owners' interest in said cargo." It should be: " Pursuant to the contract made between Meadows, the shipper and agent of the cargo-owners, on the one hand, and Morse & Co. and Charles E. Wager, the carriers, on the other hand, the latter agreed and undertook, for and in consideration of the payment of $395, to transport the same to New York."

Fourth. The respondent Wager excepts to the eighth finding of fact. The eighth finding of fact should be: " Immediately after this contract had been made between Meadows, the shipper, and Morse & Co. and Charles E. Wager, the carriers, Charles E. Wager executed a bill of lading in which H. Morse & Co. were made shippers and Charles E. Wager carrier."

Exceptions to Conclusions of Law.

Fifth. Said respondent and appellant excepts to the first of said conclusions of law, to wit: " That the libellants are entitled to a decree in the sum of $6,175.89, with interest from May 28th, 1883, with costs of this court and of the district court, as against appellant Wager; " whereas the learned circuit judge should have found as a conclusion of law, as requested, " That the libel and complaint herein should be dismissed as against the respondent Charles E.

Wager with costs of this court and of the district court, to
134 be taxed.

Dated N. Y. city, March 7th, 1889.

HYLAND & ZABRISKIE,
Proctors for Respondent & Appellant, Charles E. Wager,
45 Broadway, New York City, N. Y.

Indorsed: Exceptions to findings. Filed Mar. 11, 1889. W. S. Doolittle, clerk.

Counsel for the libellants also duly filed the following exceptions to said findings:

135 Circuit Court of the United States for the Northern District of New York.

THE PROVIDENCE WASHINGTON INSURANCE COMPANY OF PROVIDENCE, Rhode Island, and The Security Insurance Company of New Haven, Connecticut, Libellants and Appellees,
vs.
HENRY MORSE, ALANSON MORSE, and CHARLES E. WAGER, Respondents and Appellants.

The above-named libellants and appellees hereby except to the second conclusion of law found by the circuit judge herein, to wit: "The appellants Henry Morse and Alanson Morse are entitled to a decree against the libellants dismissing the libel, with costs of the district court and of this court."

Such finding or conclusion of law is not warranted by the evidence or the facts found herein by the said circuit judge. He should have found, as a conclusion of law, that the libellants herein are entitled to a decree against the respondents Henry Morse and Alanson Morse as well as against the respondent Charles E. Wager for the amount of their damages, with costs in both courts.

EDWARD D. McCARTHY,
Proctor for Libellants and Appellees.

March 7, 1889.

Indorsed: Libellants' exceptions to conclusion of law. Filed Mar. 19, 1889. W. S. Doolittle, clerk.

136 And inasmuch as the said several matters produced and given in evidence on the trial in the said circuit court and the said exceptions do not appear by the record of the decree of said circuit court, and in order that said exceptions may properly appear in the record of said circuit court, the proctors for said appellant have prepared and caused this bill of exceptions to be settled upon notice as the record thereof, according to the form of the statute in such cases made and provided and the practice of the court, and to be signed and ordered on file by said circuit judge.

WM. J. WALLACE.

(Indorsed:) Bill of exceptions. Filed Sept. 25, 1889.

137 Circuit Court of the United States for the Northern District of New York.

THE PROVIDENCE WASHINGTON INSURANCE COMPANY OF PROVIDENCE, Rhode Island, and The Security Insurance Company of New Haven, Connecticut, Libellants and Appellants,
against
HENRY MORSE and ALANSON MORSE, Respondents and Appellees, Impleaded with CHARLES E. WAGER, Respondent and Appellant.

SIRS: Please to take notice that the libellants herein appeal to the Supreme Court of the United States from the final decree of this court entered herein in the office of the clerk of this court on the 18th day of April, 1889, in so far as the said decree reverses the final decree of the district court of the United States for the northern district of New York and dismisses the libel herein as against the respondents, Henry Morse and Alanson Morse, with costs, and adjudging that said libellants take nothing by reason of said decree of said district court as against the said Henry Morse and Alanson Morse.

EDWARD D. McCARTHY,
Proctor for Libellants.

N. Y., April 27th, 1889.

138 To Clinton & Clark, Esqs., proctors for the respondents, Henry Morse & Alanson Morse; to Hyland & Zabriskie, Esqres., proctors for respondent and appellant, Charles E. Wager; to W. S. Doolittle, Esq., clerk of the circuit court of the United States for the northern district of New York.

Indorsed: Notice of appeal to U. S. Supreme Court. We admit due & timely service of a copy of the within notice of appeal this 25 day of May, 1889. Clinton & Clark, proctors for respondents, H. & A. Morse. June 12, '89, service admitted. Hyland & Zabriskie, proc's for Wager. Filed Jun- 13, 1889. W. S. Doolittle, clerk.

139 Supreme Court of the United States.

THE PROVIDENCE WASHINGTON INSURANCE COMPANY OF PROVIDENCE, Rhode Island, and The Security Insurance Company of New Haven, Connecticut, Libellants and Appellants,
vs.
HENRY MORSE and ALANSON MORSE, Respondents and Appellees, Impleaded with CHARLES E. WAGER, Respondent and Appellant.

To the honorable the Supreme Court of the United States:

The petition and appeal of The Providence Washington Insurance Company of Providence, Rhode Island, and The Security Insurance Company of New Haven, Connecticut, libellants and appellants, respectfully showeth—

That on or about May 7th, 1887, the above-named libellants filed their libel in the district court of the United States for the northern district of New York against Henry Morse, Alanson Morse, and Charles E. Wager, the respondents above named, in a cause of collision, civil and maritime, for the recovery of damages exceeding the sum of five thousand dollars ($5,000) alleged to have been sustained by said libellants as insurers of Armour, Plankinton and
Company, owners of a certain cargo of wheat laden on board
140 the steam canal-boat "Sydney" and the canal-boat "William
Worden," which cargo became damaged and a constructive total loss through the negligence of the carriers, the respondents herein, and which loss was paid to the said owners of said cargo by these libellants, who, by reason of such payment, became subrogated to the rights of said cargo owners, as by reference to said libel will more fully appear.

That thereafter and on said 7th day of May, 1887, process *in personam* was duly issued against the above-named respondent-, citing them to appear before the judge of said district court on the 31st day of May, 1887, at 10 o'clock a. m., to answer said libel, which process was duly served, and said respondents thereafter duly filed their answers to said libel, denying responsibility for said loss, and such proceedings were had in the said cause that on the 13th day of August, 1888, a final decree was made and pronounced therein by the said district court, wherein it was adjudged that the libellants recover therein against Henry Morse and Alanson Morse, respondents, the sum of four thousand five hu-dred dollars ($4,500) and against the respondent Charles E. Wager the sum of six thousand one hundred and seventy-five dollars ($6,175.00), together with costs, taxed at one hundred and seventeen dollars and sixteen cents ($117.16), and that libellants have execution for said amount for the satisfaction of the sum of six thousand two hundred and ninety-two dollars and sixteen cents ($6,292.16), that being the full amount which said libellants are entitled to recover herein, and further
ordered and decreed that payment for said respective sums
141 be entered against said respective respondents as follows:
Four thousand six hundred and seventeen $\frac{16}{100}$ths dollars ($4,617.16) against all the said respondents, jointly and severally, and for one thousand six hundred and seventy-five dollars ($1,675) against the respondent Charles E. Wager severally, as by reference to said decree will more fully appear; which decree of said district court was afterwards and on the 17th day of August, 1888, duly entered in the office of the clerk of said district court.

That thereafter and on or about August 21st, 1888, said respondents appealed from said decree to the circuit court of the United States for the northern district of New York, in the second circuit, and such proceedings were had in said circuit court that afterwards and on the 18th day of April, 1889, then said circuit court made a final decree in the said cause whereby it was decreed, among other things, that as to the respondents Henry Morse and Alanson Morse the decree of the said district court herein be reversed and the libel of the said libellants be dismissed upon the merits, with costs, and

that the libellants take nothing thereby against said Henry Morse and Alanson Morse, and further adjudging that said respondents, Henry Morse and Alanson Morse, recover of said libellants the sum of $226.57, costs and disbursements in both courts.

The decree of said circuit court also adjudged that the said decree of the district court so appealed from be affirmed with costs
142 as against the respondent Charles E. Wager, and that the said libellants recover of said respondent, Charles E. Wager, the sum of eight thousand four hundred and forty-six $\frac{37}{100}$ths dollars ($8,446.37) damages, interests and costs, and further ordered that a summary judgment be entered against Alanson Morse and John Fero, sureties of said Wager on the bond given by him on said appeal, for the sum of $75.30, costs of the circuit court, as by reference to said decree will more fully appear, which said decree of the circuit court, in so far as it reverses said decree of the district court and dismisses the libel herein and ordering judgment in favor of said defendants, Henry Morse and Alanson Morse, is, as these libellants and appellants are advised, erroneous and ought to be reversed and a judgment rendered in favor of these libellants against said respondents, Henry Morse and Alanson Morse, as well as against the respondent Charles E. Wager, with costs.

Wherefore these libellants and appellants appeal to the Supreme Court of the United States from said decree of the circuit court in so far as it reverses the decree of said district court and dismisses the libel herein with costs, the libellants insisting that the decree of the district court should have been affirmed as to all the respondents, with costs of both courts, and the libellants respectfully pray that the final decree of said circuit court, together with the libel, answers, pleadings, evidence, exceptions, and proceedings in said cause, be sent to the Supreme Court of the United States
143 without delay, and that said Supreme Court will proceed to hear said cause anew, and that said decree, in so far as it reverses the decree of said district c-urt and dismisses the libel herein upon the merits as against the respondents Henry Morse and Alanson Morse, with costs, be reversed and a decree made in favor of said libellants and against all the respondents herein, with costs, and such other decree be made herein by the Supreme Court of the United States as may be just.

Dated May 20, 1889.

EDWARD D. McCARTHY,
Proctor for Libellants.

Appeal allowed. Dated May 23, 1889.

WM. J. WALLACE.

Indorsed: Petition and appeal. Due and timely service of a copy of the within petition & appeal is admitted. Dated May 25th, 1889. Clinton & Clark, proctors for respondents H. & A. Morse. Hyland & Zabriskie, proctors for Wager. Filed Jun- 13, 1889. W. S. Doolittle, clerk.

144 Circuit Court of the United States for the Northern District of New York.

THE PROVIDENCE WASHINGTON INSURANCE COMPANY OF PROVIDENCE, Rhode Island, and The Security Insurance Company of New Haven, Connecticut, Libellants & Appellants,
vs.
HENRY MORSE and ALANSON MORSE (Impleaded with CHARLES E. WAGER), Respondents and Appellees.

Know all men by these presents that we, The Providence Washington Insurance Company of Providence, Rhode Island, and The Security Insurance Company of New Haven, Connecticut, principals, and William A. Scott, New York city, surety, are held and firmly bound to the above-named respondents, Henry Morse and Alanson Morse, of Buffalo, New York, in the sum of five hundred dollars, to be paid to the said Henry Morse and Alanson Morse, their executors, administrators, or assigns; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors and administrators, and successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 8th day of May, 1889.

145 Whereas the above-named The Providence Washington Insurance Company and Security Insurance Company, as appellants, have prosecuted an appeal to the Supreme Court of the United States, at the city of Washington, in the District of Columbia, from so much of the final decree of the circuit court of the United States for the northern district of New York as dismisses the libel herein against the said Henry Morse and Alanson Morse, with costs, which decree bears date April 18th, 1889:

Now, therefore, the condition of this obligation is such that if the above-named libellants and appellants shall prosecute their said appeal with effect and answer all damages and costs which shall be awarded against them if they shall fail to make their said appeal good, including just damages for delay, including costs and interest on the said appeal, then this obligation shall be void; otherwise to remain in full force and effect.

Sealed and delivered and taken and acknowledged this 9th day of May, 1889, as to Providence Washington Insurance Co.
WM. G. ROELKER,
Notary Public.

PROVIDENCE WASHINGTON INSURANCE COMPANY,
By J. B. BRANCH,
Vice-Pres't. [L. S.]

Sealed and delivered and taken and acknowledged this 8th day of May, 1889, as to Security Insurance Co.
E. L. WATSON.

SECURITY INSURANCE COMPANY,
By H. MASON,
Sec'ty. [L. S.]

Sealed and delivered and taken and acknowledged this 10th day of May, 1889, as to Wm. A. Scott, surety.
R. A. MAXWELL.

WM. A. SCOTT, [L. S.]
145 *West 79 St., New York.*

146 UNITED STATES OF AMERICA,
City of Providence, Rhode Island, } *ss:*
District of Rhode Island,

On this 9 day of May, 1889, John B. Branch, to me known, came before me, who, being by me sworn, did say that he resides in said Providence, and is the president of the Providence Washington Insurance Company of Providence, Rhode Island, a corporation; that the seal affixed to the foregoing instrument is the corporate seal of said company and was hereto affixed by the order of the board of directors of said company, and that he signed and executed the same by virtue of a like order of said board of directors of said company.

WM. G. ROELKER, [L. S.]
Notary Public in and for City and County of Providence, State of Rhode Island.

UNITED STATES OF AMERICA,
City of New Haven, District of Connecticut, } *ss:*

On this 8th day of May, 1889, Herbert Mason, to me known, came before me, who, being by me sworn, did say that he resides in New Haven, Connecticut, and is secretary of the Security Insurance Company of New Haven, Connecticut, a corporation; that the seal affixed to the foregoing instrument is the corporate seal of said company and was hereto affixed by the order of the board of directors of said company, and that he signed and executed the same
147 by virtue of a like order of said board of directors of said company.

WALTER POND,
[L. S.] *Notary Public within and for New Haven County.*

UNITED STATES OF AMERICA,
City of N. Y., District of *County of N. Y.,* } *ss:*

W. A. Scott, being duly sworn, deposes and says that he resides at 145 West 79 St., in the city of New York, and that he is worth the sum of one thousand dollars over and above all his just debts and liabilities.

Sworn to before me this 10 day of May, 1889.

ROBT A. MAXWELL,
[L. S.] *Notary Public for Kings County, with Certificate Filed in New York County.*

The foregoing bond is approved as to form, amount, and sufficiency.

May 23, 1889.

WM. J. WALLACE.

Indorsed: Bond on appeal to U. S. Supreme Court. We hereby approve of the within bond as to form and sufficiency of surety and amount. May 10, '89. Hyland & Zabriskie, proctors for Chas. E.

Wager. Clinton & Clark, proctors for H. A. Morse. Due and timely service of a copy of the within bond is hereby admitted. Dated May 25, 1889. Hyland & Zabriskie, procs. for Wager. Clinton & Clark, proctors for respondents H. & A. Morse. Filed Jun- 13, 1889. W. S. Doolittle, clerk.

148 UNITED STATES OF AMERICA, *ss:*

To Henry Morse and Alanson Morse, Greeting:

Whereas The Providence Washington Insurance Company of Providence, Rhode Island, and The Security Insurance Company of New Haven, Connecticut, as libellants, have lately appealed to the Supreme Court of the United States from so much of a final decree lately rendered in the circuit court of the United States for the northern district of New York, in the second circuit, made in favor of you and against the said libellants and as dismisses said libel against you, with costs, as stated and alleged in the notice and petition of appeal of said libellants, and have filed the security required by law:

You are hereby cited and admonished to be and appear before the said Supreme Court, at the city of Washington, on the second Monday of October, eighteen hundred and eighty-nine, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of Syracuse, in the northern district of New York, the 23rd day of May, 1889.

WM. J. WALLACE.

Indorsed: Citation. Due and timely service of a copy of the within citation is admitted. May 25th, 1889. Hyland & Zabriski, procs. for Wager. Clinton & Clark, proctors for respondents H. & A. Morse. Filed Jun- 13, 1889. W. S. Doolittle, clerk.

149 Circuit Court of the United States for the Northern District of New York.

THE PROVIDENCE WASHINGTON INSURANCE COMPANY OF PROVIDENCE, RHODE ISLAND, AND THE SECURITY INSURANCE COMPANY OF NEW HAVEN, CONN., Libellants & Appellees,

vs.

CHARLES E. WAGER, Impleaded with HENRY MORSE and ALANSON MORSE, Respondent & Appellant.

SIRS: Please take notice that the respondent, Charles E. Wager, in the above-entitled action hereby appeals to the Supreme Court of the United States from each and every part of the final decree of the circuit court of the United States for the northern district of New York bearing date January 15th, 1889, and entered on the 18th day of April, 1889, in the office of the clerk of the said circuit court, which decree adjudges the libellants recover herein against the said Charles E. Wager the sum of $6,175.89, damages; $2,153.32, inter-

est, amounting in all to the sum of $8,329.21, together with $117.16, costs of the district court, and $75.30, costs of the circuit court.

Dated N. Y. city, June 6th, 1889.

Yours, &c., HYLAND & ZABRISKIE,
Proc's for Resp'd't & App'l't Wager,
No. 45 Broadway, N. Y. City, N. Y.

150 To W. S. Doolittle, Esq., clerk U. S. circuit court, northern district of New York; E. D. McCarthy, Esq., proctor for libellants & appellees, and Messrs. Clinton & Clark, proctors for respondents Henry and Alanson Morse.

151 Circuit Court of the United States for the Northern District of New York.

THE PROVIDENCE WASHINGTON INSURANCE COMPANY OF PROVIDENCE, Rhode Island, and The Security Insurance Company of New Haven, Conn., Libellants & Appellees,
vs.
CHARLES E. WAGER, Impleaded with HENRY MORSE and ALANSON MORSE, Respondent & Appellant.

To the honorable the Supreme Court of the United States:

The appeal of Charles E. Wager, the above-named respondent and appellant, respectfully showeth—

That on the 7th day of May, 1887, the above-named libellants filed their libel in the district court of the United States for the northern district of New York against the said Charles E. Wager and Henry and Alanson Morse for damages alleged to have been sustained by the cargo of wheat inboard the canal-boat "William Worden," which sank with her said cargo, on or about the 29th day of May, 1883, at Esopus island, in the Hudson river, New York, and that your petitioner was served with process issued upon the said libel, and your petitioner thereupon filed his answer to the said libel, and such proceedings were had in the said cause that on the 13th day of August, 1888, a final decree was made and pro-
152 nounced therein by the said district court, which was entered on the 17th day of August, 1888, wherein it was in substance adjudged that the said libellants recover against your petitioner the sum of $6,175, together with $117.16 costs.

And that after such final decree your petitioner duly appealed therefrom to the circuit court of the United States for the northern district of New York and the said cause was removed thereby into the said circuit court and there tried anew, and such proceedings were had in the said circuit court that afterwards the said circuit court made a final decree in the said cause, bearing date January 15th, 1889, and entered in the office of the clerk of said court April 18th, 1889, whereby it was decreed that the said decree of the district court be in all things affirmed as to your petitioner and reversed as to the respondents Henry and Alanson Morse, and that said libellants recover of your petitioner the sum of $6,175.89, dam-

ages; $2,153.32, interest; $117.16, the costs of the said district court as taxed, and $75.30, the costs of the said circuit court as taxed, and that the stipulators cause their stipulations to be fulfilled; which said decree of the said circuit court is, as this appellant is advised, erroneous and ought to be reversed.

Wherefore this appellant appeals from the whole of said decree of said circuit court to the Supreme Court of the United States and respectfully prays that the decree of the said circuit court and the libel, answer, pleadings, depositions, findings, exceptions,
153 evidence, and proceedings in the said cause may be sent to the Supreme Court of the United States without delay, and that the said Supreme Court will proceed to hear the said cause, and that the said decree of the said circuit court and every part thereof may be reversed, and that a mandate may be issued to the said circuit court directing that the said decree be reversed, and that a decree may be entered in favor of your petitioner for his costs, or that such other decree be made as to the said Supreme Court shall seem fit.

Dated New York city, June 6th, 1889.

HYLAND & ZABRISKIE,
Proctors for Appellant Charles E. Wager.

P. O. address and office, No. 45 Broadway, New York city, N. Y.

The foregoing appeal is hereby allowed to the Supreme Court of the United States.

Dated N. Y., June 6, 1889.

WM. J. WALLACE.

Indorsed: Citation, notice, and petition of appeal. Due and timely service of a copy of the within citation, notice, and petition is hereby admitted. Dated New York, June 7, 1889. E. D. McCarthy, lbls.' proc. Clinton & Clark, proctors for resp'd's H. & A. Morse. Filed Jun- 11, 1889. W. S. Doolittle, clerk.

154 Know all men by these presents that we, Charles E. Wager and Josiah A. Hyland, are held and firmly bound unto the Providence Washington Insurance Company of Providence, R. I., and the Security Insurance Company of New Haven, Conn., in the sum of five hundred dollars, to be paid to the said Providence Washington and Security Insurance Companies, their successors, legal representatives, executors, administrators, or assigns; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 3rd day of June, in the year of our Lord one thousand eight hundred and eighty-nine.

Whereas Charles E. Wager, as appellant, has appealed to the Supreme Court of the United States from a decree of the circuit court of the United States for the northern district of New York, bearing date the 15th day of January, 1889, in a suit in which the

said Providence Washington and Security Insurance Co.'s are libellants against said Charles E. Wager *et al.:*

Now, therefore, the condition of this obligation is such that if the above-named appellant, Charles E. Wager, shall prosecute said appeal with effect and pay all costs which shall be awarded against him, as such appellant therein, if he shall fail to make said appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and effect.

155 Words "damages and" erased before execution, 3rd line from bottom.

Sealed and delivered and taken and acknowledged this 18 day of May, 1889, before me—

CHARLES E. WAGER. [L. S.]

DANIEL J. AUGUSTINE,
[L. S.] *Notary Public, N. Y. Co., as to Chas. E. Wager.*

Sworn to before me June 3, 1889, as to J. A. Hyland.

JOSIAH A. HYLAND. [L. S.]

DANIEL J. AUGUSTINE,
Notary Public, N. Y. Co.

UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

Josiah A. Hyland, being duly sworn, deposes and says that he resides in the southern district of New York, and that he is worth the sum of one thousand dollars over and above all his just debts and liabilities.

Sworn to this 3rd day of June, A. D. 1889, before me—

JOSIAH A. HYLAND.

DANIEL J. AUGUSTINE,
[L. S.] *Notary Public, N. Y. Co.*

This bond approved as to form and amount and sufficiency of surety.

Dated New York city, June 3d, 1889.

EDW'D D. McCARTHY,
Libellants' Proctor.

Indorsed: Bond for costs on appeals. Approved June 6, 1889. Wm. J. Wallace. Filed Jun- 12, 1889. W. S. Doolittle, clerk.

156 By the Honorable William J. Wallace, judge of the circuit court of the United States for the northern district of New York, in the second circuit.

To the Providence Washington Insurance Company of Providence, Rhode Island, and The Securit- Insurance Company of New Haven, Conn., and Henry Morse and Alanson Morse:

Whereas the respondent Charles E. Wager has lately appealed to the Supreme Court of the United States from a decree rendered in the circuit court of the United States for the northern district of

New York, in the second circuit, made in favor of you, the said Providence Washington and Security Insurance Companies and Henry and Alanson Morse, and against the said respondent, Charles E. Wager, dated January 15th, 1889, and entered April 18th, 1889, stating that the said decree is erroneous and praying that the same be reversed, and has filed the security required by law:

Now, therefore, you are hereby cited to appear before the said Supreme Court of the United States, at the city of Washington, in the District of Columbia, on the second Monday of October next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand and the seal of this court, at the city of New York, in the second circuit, the sixth day of June, in the year of our Lord one thousand eight hundred and eighty-nine, and of the Independence of the United States the one hundred and thirteenth.

WM. J. WALLACE.

157 UNITED STATES OF AMERICA, *Northern District of New York*, } *ss:*

I, William S. Doolittle, clerk of the circuit court of the United States of America for the northern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from 1 to 156, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of The Providence Washington Insurance Company of Providence, Rhode Island, and The Security Insurance Company of New Haven, Connecticut, libellants and appellees, *vs.* Henry Morse, Alanson Morse, and Charles Wager, respondents and appellants (in admiralty), as the same remain of record and on file in said office and as quireded by section 6 of rule 8 of the Supreme Court.

In testimony whereof I have caused the seal of said court to be hereunto affixed, at the city of Utica, in the northern district of New York, in the second circuit, on the tenth day of October, in the year of our Lord one thousand eight hundred and eighty-nine, and of our Independence the one hundred and fourteenth.

Seal of the U. S. Circuit Court, Northern District N. Y.

W. S. DOOLITTLE, *Clerk.*

Endorsed on cover: Case No. 13,881. N. New York C. C. U. S. No. 263. Charles E. Wager, appellant, *vs.* The Providence Washington Insurance Company of Providence, R. I., The Security Insurance Company of New Haven, Conn., Henry Morse and Alanson Morse. Filed October 22, 1889. Case No. 13,907. No. 278. The Providence Washington Insurance Company of Providence, R. I., and The Security Insurance Company of New Haven, Conn., appellants, *vs.* Henry Morse and Alanson Morse. Filed November 1, 1889.

150 US 99

Office Supreme Court U. S.
FILED.
APR 25 1893
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

No. 263. 191

IN ADMIRALTY.

CHARLES E. WAGER,
Appellant,
vs.

THE PROVIDENCE WASHINGTON INSURANCE COMPANY OF PROVIDENCE, R. I., THE SECURITY INSURANCE COMPANY OF NEW HAVEN, CONN., HENRY MORSE and ALANSON MORSE.

BRIEF IN BEHALF OF APPELLANT CHARLES E. WAGER, ON APPEAL FROM JUDGMENT OF CIRCUIT COURT FOR NORTHERN DISTRICT OF NEW YORK.

HYLAND & ZABRISKIE,
Proctors for Appellant Wager,
No. 45 Broadway,
New York, N. Y.

C. G. Burgoyne, Walker and Centre Sts., N. Y.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

No. 263.

CHARLES E. WAGER
Appellant.

vs.

THE PROVIDENCE WASHINGTON INSURANCE COMPANY of Providence, R. I., THE SECURITY INSURANCE COMPANY of New Haven, Conn., HENRY MORSE and ALANSON MORSE.

In Admiralty.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

BRIEF OF APPELLANT CHARLES E. WAGER.

Statement of the Case.

This suit is brought to recover the value of a cargo of wheat shipped in-board the canal boat "William Worden," at Buffalo, N. Y., on the 17th day of May, 1883, and consigned to Armour, Plankinton & Co., New York. The cargo was lost while in transit in-board said boat, on the 29th day of May, 1883, in the Hudson River, at or near Esopus Island.

The parties to the Affreightment Contract.

The appellant Charles E. Wager was the master and owner of the canal boat "William Worden," and also of the steam canal boat "Sydney." Henry Morse and Alanson Morse, composing the firm of H. Morse & Co., were doing business at Buffalo as intermediaries between boatmen and shippers of grain, in procuring cargoes of grain to be shipped for a commission. W. Meadows was a shipper at Buffalo, doing business as agent for owners of cargoes to be shipped from Buffalo to New York. Armour, Plankinton & Co. were grain merchants, having their office and place of business at New York City, and became the consignees of the cargo of grain in question.

The manner in which the oral Affreightment Contract was made.

On or before the 17th day of May, 1883, the appellant Charles E. Wager, master and owner of the boat "William Worden," having said boat in the port of Buffalo ready to engage in the transportation of cargo to New York, applied in person at the office of said firm of H. Morse & Co. and requested Alanson Morse, one member of said firm, to procure a cargo to be transported in said boat to New York. Then and there Mr. Alanson Morse told Capt. Wager that he could get him a load, and asked the Captain to go along with him. Capt. Wager and Alanson Morse then went together to the office of William Meadows. Alanson Morse, in the presence of Capt. Wager, asked Mr. Meadows if he had any grain, and Mr. Meadows told him (Mr. Morse) that he had some five-cent wheat. Thereupon, Alanson Morse took an order for the said cargo of wheat, to be shipped in-board the boat "Worden" to New York (Record, p. 32).

No further conversation took place at the time of procuring the cargo as above, between Mr. Morse and Mr. Meadows. Nothing was said at that time with reference to insurance. No request was then made by W. Meadows to Alanson Morse to get the cargo insured. It was assumed only by W. Meadows that H. Morse & Co. would get the cargo insured under the general course of business.

" Q. Mr. Meadows, in this particular instance, was there any direction given by you to whoever you made the agreement with to get the cargo insured, or to get it insured in any particular company? A. *Well, I can't remember at this time whether I personally gave any directions. I suppose I did not personally.*"

" Q. Under the general course of business, as you knew it at that time, was it assumed by you, and, so far as you know, the party with whom you were dealing, that the cargo would be insured, under the course of business? A. Yes, sir." (Record, p. 28.)

Then, after the cargo was insured in the manner hereinafter noted, W. Meadows gave H. Morse & Co. an order upon the grain storehouse to deliver to the boat " William Worden " a cargo of grain. Captain Wager received the order from H. Morse & Co. and presented it to the grain storehouse, and thereupon the cargo of grain was delivered to the boat " William Worden."

The manner in which the insurance contract was made, upon which this suit is based, and under which the cargo of wheat was insured while in transit from Buffalo to New York, inboard the boat " William Worden."

Every spring, before the opening of canal navigation for the purpose of procuring business, the Providence Washington Insurance Company and the Security Insurance Company, the libellants herein, by their agents,

were accustomed to deliver in Buffalo, to intermediary firms or brokers, such as the firm of H. Morse & Co., blank open or running cargo policies, which run for the season of navigation.

Pursuant to this custom, in the spring of the year 1883, before this cargo was shipped on board the canal boat "Worden," Worthington & Sill, general agents of the Providence Washington Ins. Co. and the Security Ins. Co., the libellants, delivered to H. Morse & Co. the open or running cargo policy, which, with other clauses and covenants not pertinent to the issues herein, contained the following covenants (Record, p. 61, Claimant's Exhibit A):

UNIFORM CANAL CARGO POLICY.

THE NEW ENGLAND UNDERWRITERS.

THE SECURITY INSURANCE CO.

OF NEW HAVEN, CONN.

THE PROVIDENCE WASHINGTON INS. CO.

OF PROVIDENCE, R. I.

Each acting and contracting for itself, and not one for the other, for the true performance of the premises; each company for its own part only, which is one-half of all liability accruing under this Policy.

BY THIS POLICY OF INSURANCE,

on account of H. Morse & Co., for whom it may concern:

Do insure the several persons, whose names are hereafter endorsed hereon as owner, advancer, or common carrier on goods, wares, merchandise or country produce, on his own boat, or boats belonging to others, loaded on commission or chartered.

From place to place, as endorsed hereon, or in a book kept for that purpose, for the several amounts, at the rate, and on the goods, wares, merchandise or country produce, as specified in the said endorsement.

No risk considered as insured under this policy until said endorsement is approved and signed by these companies, or their duly authorized agents, at , unless with special agreement with the companies and endorsed hereon."

This open policy shows that it insures " on account of H. Morse & Co., for whom it may concern, the several persons whose names thereinafter endorsed thereon as owner, advancer or common carrier of goods, wares, merchandise or country produce on their own boat or boats belonging to others loaded on commission or chartered."

Before this cargo of grain was put in-board the boat, and after the aforesaid order was taken by Alanson Morse from W. Meadows, the appellant Wager asked Alanson Morse, one of the firm of H. Morse & Co., to get an insurance on the said cargo for his benefit, and in the presence of Capt. Wager, Alanson Morse told the clerk of H. Morse & Co. to attend to it, and the clerk replied that he would (Record, p. 35).

Thereupon H. Morse & Co., before the cargo was loaded in-board the boat " Worden," applied to the libellants, through their general agents, Worthington & Sill, to insure the cargo of grain while *in transitu* in-board the boat " Worden," in writing, as follows (Record, p. 67, Claimant's Exhibit B) :

WORTHINGTON & SILL,

GENERAL AGENTS.

NEW ENGLAND UNDERWRITERS' CANAL INSURANCE,

Office, No. 48 Main Street and 10 Dayton Street, Buffalo, N. Y.

(Copy.)

Insurance is wanted by H. Morse & Co. Loss, if any, is payable to do. or order on wheat in-board cargo of boat "Wm. Worden."

$9,875 from Buffalo to New York.

Rate cts. is $

Total premium, $

Buffalo, May 17, 1883.

H. MORSE & Co.,
Applicant."

On receipt of this application Worthington & Sill issued and delivered to H. Morse & Co. a certificate of insurance as follows (Record, p. 67, Libellants' Exhibit No. 2):

"Providence Washington Ins. Co., Providence, R. I. Security Ins. Co., New Haven, Conn.

NEW ENGLAND UNDERWRITERS,

INLAND MARINE DEPARTMENT,

WORTHINGTON & SILL, Gen'l Agents, Buffalo, N. Y.

CANAL CARGO CERTIFICATE.

No. 668. $9,875.

This certifies that H. Morse & Co. insured under and subject to the conditions of policy No. 772, issued by

the New England Underwriters, in the sum of ninety-eight hundred seventy-five dollars, in-board cargo of boat " Wm. Worden."

On wheat, $9,875 at and from Buffalo to New York to

Loss (if any) payable to assured or order and return of this certificate.

This certificate of insurance is not valid until countersigned by the authorized agents for this company at Buffalo, N. Y.

Buffalo, N. Y., May 17th, 1883.

WORTHINGTON & SILL,
General Agents.

[Written across face in red ink:] "Received, New York, June 26th, 1883, from New England Underwriters ninety-two hundred eleven $\frac{75}{100}$ dollars in full for all loss and damage under this certificate, which is hereby surrendered and annulled.

$9,211.75.

ARMOUR PLANKINTON,
WHITLOCK.

[Endorsed:] H. Morse & Co."

Upon the delivery of said certificate of insurance, Worthington & Sill endorsed on the book kept for that purpose " H. Morse & Co., boat, ' Wm. Worden,' from Buffalo to New York, $9,875, rate 15 cents, premium $14.82, wheat" (Record pp 41–2).

The said endorsement, made in the book described, was made in accordance with the terms of the open or running policy above referred to, which says: "From place to place, as endorsed hereon, or in a book kept for that purpose, for the several amounts, at the rate and on the goods, wares, merchandise or country produce, as specified in the said endorsement" (Record, p. 61).

After the aforesaid order for the said cargo of grain for the boat "William Worden" was procured, as

above stated, from W. Meadows, by Alanson Morse, and before the cargo was loaded in the boat "Worden," the foregoing certificate of insurance was delivered by the libellants by the hand of Worthington & Sill, their general agents, to H. Morse & Co., and by H. Morse & Co. endorsed in blank and delivered to W. Meadows. This was done because it was necessary to insure the cargo before it was loaded in-board, so that any loss would be covered which might happen during the time the cargo was being transferred from the elevator into the boat as well as while *in transitu*.

Says WILLIAM MEADOWS: "That is a part of the whole contract. Morse & Co. go down and make their application for insurance, and when the boat is loaded, or before it is loaded, the certificate is sent up to my office, and when the bill of lading is signed, as far as my party is concerned, the contract is consummated. The bill of lading is signed by Morse & Co. and a copy is signed by myself.

The insurance certificate is either brought to me at the time the bill of lading is brought, or before. We usually require them before, so that we know that the boat is insured before she is loaded, or by the time she is loaded" (Record, p. 38).

All the foregoing steps were preliminary to taking in-board the boat "Worden" the cargo of grain. That is, the appellant Wager applied to H. Morse & Co. to get him a cargo. Thereupon Alanson Morse and Capt. Wager went together to the office of W. Meadows and took a cargo of five-cent wheat. Then the appellant Wager asked H. Morse & Co. to get the cargo insured for his benefit, and then H. Morse & Co. applied to the insurance company and received the foregoing certificate of insurance, which they endorsed in blank and delivered to W. Meadows, whereupon W. Meadows gave an order to load the boat "Worden."

The cargo of grain having been loaded in-board the boat "Worden," and the number of bushels taken in-board the boat having been ascertained by weighing

thereof, Capt. Wager and H. Morse & Co., through their agent, signed and delivered to W. Meadows the affreightment contract as follows (Libellants' Exhibit 1, Record, p. 65):

"No.

[Vignette.]

BUFFALO, May 17, 1883.

Shipped by W. Meadows, in apparent good order, on board the canal boat 'Wm. Worden,' of Morse, whereof is master, the following described property, to be transported to place of destination without unnecessary delay, and to be delivered as addressed on the margin in like good order, in the customary manner, free of lighterage, upon payment of freight and charges as prescribed in this bill. Consignees to pay all harbor towing from and to the usual place of landing. Three week days, regardless of weather (including day of arrival, providing notice of arrival shall be given before four o'clock P. M.), after arrival and notice of same, to be allowed consignees to discharge this cargo, after which time the cargo or consignees are to pay demurrage at the rate of two and one-half per cent. per day upon the freight, including tolls, for each and every day of such demurrage over the three days as above specified, until the cargo is fully discharged. And it is agreed between the carriers and shippers and assigns that in consideration, especially of the rate of freight hereon named, the said carriers having supervised the weighing of said cargo inboard, hereby agree that this bill of lading shall be conclusive as between shippers and assigns and carriers as to quantity of cargo received in-board and to be delivered at port of destination, and that they will deliver the full quantity hereon named. All damage caused by the boat or carrier, or deficiency in the cargo from quantity as hereon specified, to be paid for by the carrier and deducted from the freight, and any excess in the cargo to be paid for to the carrier by the con-

signee. In case grain becomes heated while in transit, the carrier shall deliver his entire cargo and pay only for any deficiency caused by heating exceeding five bushels for each one thousand bushels.

The freight charges and demurrage payable to as directed below or order, at place of destination, who is the only party authorized to collect the same, and whose receipt shall be in full for all demands on this cargo of bill of lading.

In witness whereof, the said master of said boat hath affirmed to two bills of lading, one marked "Original" and one marked "duplicate," of this tenor and date, one of which being accomplished the other to stand void.

7,900 bu. No. 2 red wheat, ex cargo schr. "R. Hallaran."

Freight to New York, five (5) cents per bu.

Advanced charges, $200.

H. MORSE & CO.,
Per C. E. WOLFE.

(Seventy-nine hundred bushel.)

C. E. WAGER.

(In margin:) Armour, Plankinton & Co., New York.

The freight charges and demurrage, to the amount of $516.94, are payable by check to the order of the National Bank of the Republic, in New York, such check to be delivered to E. B. Brooke & Co., for such bank; the balance is payable to said E. B. Brooke & Co., who is the only party authorized to collect the same, whose receipts shall be in full for all demands therefor.

(New.)

(Eb. 28.)

Printed across the face in red ink the word "original."

Endorsed: Armour, Plankinton & Co., Whitlock.

This completed the contract of affreightment between the shipper, W. Meadows, and H. Morse & Co. and Charles E. Wager, the common carriers, and Armour, Plankinton & Co., the consignees, and also the insur-

ance contract on the cargo between the libellants and H. Morse & Co., for whom it might concern.

Thereupon, W. Meadows, before the boat "Worden" started from Buffalo with the cargo in-board, forwarded the aforesaid affreightment contract or bill of lading, with the aforesaid certificate of insurance attached thereto, to New York, to Armour, Plankinton & Co. (Record, p. 39).

The collateral or sub-affreightment contract between H. Morse & Co. and Charles E. Wager:

Before Capt. Wager started the said boat "Worden" from Buffalo with her cargo, pursuant to the above affreightment contract, he needed money to pay the charges for elevating and weighing and trimming the grain in his boat, to pay the lake charges which were owing and still a lien upon the cargo of grain for transporting thereof on the lakes from Chicago to Buffalo, to pay the premium for insuring the grain while *in transitu* in his boat from Buffalo to New York, under the policy above set forth, and to pay his running expenses to New York. Under the custom at Buffalo, in shipping grain from Buffalo to New York, as in this case, the intermediary men or brokers advance all the money necessary to forward the grain on from Buffalo to New York. In this case, H. Morse & Co. advanced all the money which the appellant Charles E. Wager needed, as above stated, to proceed on his voyage before he started the boat.

That is, H. Morse & Co. not only obligated themselves as joint common carriers with Charles E. Wager, by signing the foregoing affreightment contract, but in addition thereto advanced all the above said money necessary to enable Capt. Wager to take the cargo of grain to New York.

Therefore, before Wager started with the said cargo, he settled with H. Morse & Co. and secured them

against loss as common carriers, and for the money which they had advanced and for their commission, in the following way: H. Morse & Co. kept a book account with the boat "William Worden" for this load of grain, and charged in the book to the boat the following items:

Insurance premium	$14 82
Commission	19 75
Cash	34 74
William Meadows, the shipper	200 00
Alanson Morse	240 26
Trimming	9 87
Total	$519 44

The item of $200 to William Meadows was money paid Mr. Meadows to pay the lake charges for transporting said cargo of grain from Chicago to Buffalo. The item of $240.26 to Alanson Morse was money which the captain paid out of his freight to Alanson Morse on account of the purchase price of his boat. The item of cash of $34.74 was money which the captain retained to pay his expenses along the canal after leaving Buffalo. The item of $9.87 for trimming was to pay the charges for trimming the cargo in the boat while the cargo was being taken on, and the item of $19.75 was the commission of five per cent. on the amount of freight paid to H. Morse & Co. for their services in getting the load and in advancing the money, and the $14.82 was the premium paid by H. Morse & Co. to Worthington & Sill, the agents of the libellants, for insuring the cargo.

The foregoing sum of $519.44 the captain receipted for on account of his freight on the books of H. Morse & Co. on the settlement between H. Morse & Co. and the captain, after taking on the cargo and after delivering a bill of lading to the shipper, W. Meadows (Record, p. 34).

That is, to secure H. Morse & Co. for the aforesaid advancement, and also to secure H. Morse & Co. for having guaranteed, as common carriers the affreightment contract, by signing the original affreightment contract as common carrier with Charles E. Wager, the appellant Charles E. Wager signed and delivered to H. Morse & Co. the collateral or sub-affreightment contract as follows (Claimant's Exhibit E, Record, p. 68):

No.

BUFFALO, May 18, 1883.

Shipped by H. Morse & Co., in apparent good order, on board the canal boat "William Worden," of Syracuse, whereof Charles E. Wager is master, the following described property, to be transported to place of destination, without unnecessary delay, and to be delivered as addressed on the margin, in like good order, in the customary manner, free of lighterage, upon payment of freight and charges, as prescribed in this bill.

Consignees to pay all harbor towing from and to the usual place of landing. Three week days, regardless of weather (including day of arrival, providing notice of arrival shall be given before four o'clock P. M.) after arrival and notice of same, to be allowed consignees to discharge this cargo, after which time the cargo or consignees are to pay demurrage at the rate of two and one-half per cent. per day upon the freight, including tolls, for each and ever day of such demurrage over the three days as above specified, until the cargo is fully discharged. And it is agreed between the carriers and shippers and assigns that in consideration especially of the rate of freight hereon named, the said carriers having supervised the weighing of said cargo in board, hereby agree that this bill of lading shall be conclusive as between shippers and assigns and carriers as to quantity of cargo received in board and to be delived at port of destination, and that they will deliver

the full quantity hereon named. All damage caused by the boat or carrier or deficiency in the cargo from quantity as hereon specified to be paid for by the carrier, and deducted from the freight, and any excess in the cargo to be paid for to the carrier by the consignee, In case grain becomes heated while in transit, the carrier shall deliver his entire cargo and pay only for any deficiency caused by heating, exceeding five bushels for each one thousand bushels.

The freight charges and demurrage to the amount of $ are payable by check to the order of , New York, such check to be delivered to for such bank, the balance payable to said , who is the only party authorized to collect the same, whose receipt shall be in full for all demands therefor.

Tolls on this cargo having been advanced by H. Morse & Co., if refunded, must be to them or to their order.

In witness whereof the said master of said boat hath affirmed to two bills of lading, one marked "Original," and one marked "Duplicate," of this tenor and date, one of which being accomplished, the other to stand void.

7,900 bushels of wheat.

Freight to New York, per bushel, 5	$395 00
Captain's advance	319 44
On safe delivery, E. B. Brooke & Co., collect as above and pay captain	75 56

Hold subject to our draft $319.44.

H. Morse & Co.,
Fero.

Care E. B. Brooke & Co.,
New York.

J. W. Schlehr,
Dept. Clerk.

[ENDORSED:]

Insurance	$14 82
Commission	19 75
Trimming	9 87
Cash	34 74
H. Morse	240 26
	319 44

On the back of the above bill of lading is endorsed the money advanced Capt. Wager by H. Morse & Co. These are the same items which were charged in the book kept by H. Morse & Co. at the time of the settlement between H. Morse & Co. and the appellant Charles E. Wager, above set forth, except the $200 advanced to W. Meadows to pay the back lake charges against the cargo.

By this collateral or sub-affreightment contract the appellant Wager was consigned by H. Morse & Co. to E. B. Brooke & Co., New York, and by the signing and delivery thereof the appellant Charles E. Wager acknowledged the receipt of the said advances and agreed to permit the same to be deducted out of the freight by E. B. Brooke & Co. at New York, for the benefit of and to pay H. Morse & Co. the said advances.

It is seen, therefore, that by this collateral or sub-affreightment contract H. Morse & Co. secured themselves by the agreement on the part of the the appellant Charles E. Wager that he would transport said cargo to New York for said five cents per bushel, and also that out of said five cent frieght he would pay back to H. Morse & Co. the moneys which they had advanced on account of his freight, as well as their commission charges for securing the cargo.

The manner in which H. Morse & Co. secured the $200 advanced to pay back charges on said grain, and for the benefit

of the owners of the grain, and not on account of the freight of the appellant, Charles E. Wager.

As shown above, H. Morse & Co., when said cargo was secured, advanced to W. Meadows, the shipper, $200, to pay freight and charges already incurred against this cargo of grain for transporting it from Chicago to Buffalo. This money was advanced, not for the benefit of the appellant, Charles E. Wager, nor was it advanced on account of his freight. It was advanced for the benefit of the owners of the cargo, and H. Morse & Co., under the custom of the trade, in order to procure the business of intermediary men or scalpers, advanced the same. Hence, in order to secure themselves for this advance, as well for the advance they had made the appellant Wager on account of freight, H. Morse & Co. had endorsed on the original bill of lading, or affreightment contract, between themselves and Capt. Wager as carriers, and W. Meadows as shipper, the following endorsement (Record, p. 66):

"The freight charges and demurrage, to the amount of $516.94, are payable by check to the order of the National Bank of the Republic in New York, such check to be delivered to E. B. Brooke & Co. for such bank; the balance is payable to said E. B. Brooke & Co., who is the only party authorized to collect the same, whose receipts shall be in full for all demands therefor."

That is, the consignees of the grain, when they accepted the cargo at New York under the said original bill of lading or affreightment contract, were instructed by the above said endorsement thereon to pay $516.94 advanced by H. Morse & Co., as shown above, out of the purchase price of said grain by check to the order of National Bank of the Republic, and deliver the same to E. B. Brooke & Co., which E. B. Brooke & Co. were to accept as cash. By this method H. Morse & Co. were

protected from any danger of loss of the money advanced by retaining a lien upon the cargo until it was delivered to the consignee and their money paid back to them out of the purchase price thereof.

Again, in order to protect themselves against their own consignee agent, E. B. Brooke & Co., at New York, H. Morse & Co., at the date the boat left Buffalo with said cargo, forwarded, through their bank at Buffalo to New York, upon E. B. Brooke & Co., a draft as follows (Record, p. 69) :

H. MORSE & CO.

$516.94. BUFFALO, N. Y., May 18, 1883.

Pay to the order of J. W. Bridgman, cashier, five hundred and sixteen $\frac{94}{100}$ dollars, fifteen days after date; or if you shall sooner collect freight and charges on canal boat "William Worden," then pay said sum immediately thereafter. A bill of lading of such boat is placed in your hands, bearing date May 17, 1883, for the express purpose of enabling you to meet this draft.

H. MORSE & CO.,
J. FERO.

To E. B. BROOKE & Co., New York.

Protest for non-acceptance only.

Printed across the face in red ink :

* * * accept this draft and agree to pay the amount named as therein directed, at the * * *

(Signed) E. B. BROOKE & Co.

This last above-mentioned draft E. B. Brooke & Co. were enabled to meet by the check drawn to the order of the National Bank of the Republic in New York, which the consignee owners of the cargo were instructed to pay E. B. Brooke & Co. by the aforesaid endorsement on the original bill of lading or affreightment contract.

The insurance premium was paid to the libellants by H. Morse & Co. before the loss of the cargo happened.

Says Henry S. Sill, one of the agents for the libellants:

"Q. Look at Ex. C and see whether that shows whether the premium was paid or not. A. Yes, sir; it was paid May 23, by H. Morse & Co." (Record, p. 42).

The loss happened May 29th. The insurance premium was therefore paid by H. Morse & Co. to the libellants six days before the loss occurred.

The method of making the affreightment contract and getting the cargo insured, above set forth, has been in vogue for the last twenty-five years or more, and by it every one is made secure.

First. Before the cargo is taken from the grain elevator money is advanced to pay the charges which have already accrued thereon for transporting it from Chicago on to Buffalo. This is done, as shown in the above case, by the intermediary men or brokers. It was done in this case when H. Morse & Co. advanced $200 to W. Meadows to pay such charges.

Second. In order that the cargo of grain should be insured against accident after it left the elevator, an insurance contract was made by H. Morse & Co. in which the libellants agreed to insure, on account of H. Morse & Co., for whom it might concern, the several persons whose names were endorsed thereon, or in a book kept for that purpose, as owner, advancer or common carrier, and the names endorsed thereon were H. Morse & Co.; and said certificate, certifying such insurance, was endorsed in blank by H. Morse & Co. and delivered to W. Meadows, who was acting as agent of the owners of the cargo, thereby ordering, in case of

loss or damage to said cargo, the insurance companies, the libellants herein, to pay such loss or damage to the holder of such certificate.

THIRD. To further indemnify the owners of said cargo that the appellant Charles E. Wager would transport said cargo from Buffalo to New York and safely deliver the same, H. Morse & Co. personally guaranteed such contract and made themselves, for the purpose of such guarantee, joint common carriers with the appellant Charles E. Wager, by signing, with the said appellant, the original affreightment contract or bill of lading given by W. Meadows as shipper, and consigning the said cargo to Armour, Plankington & Co.

FOURTH, In order to indemnify and hold H. Morse & Co. harmless against loss, Charles E. Wager signed the collateral or sub-affreightment contract, in which he agreed with H. Morse & Co. to transport said cargo from Buffalo to New York at the same rate of freight which said H. Morse & Co., and said Charles E. Wager, had agreed to transport it for in the original affreightment contract or bill of lading with W. Meadows. While, therefore, H. Morse & Co. had bound themselves with W. Meadows by signing the original affreightment contract with the appellant Charles E. Wager, to transport the cargo from Buffalo to New York for five cents per bushel, they (H. Morse & Co.) at the same time secured an affreightment contract from the appellant Charles E. Wager, in which he agreed with them that he would transport the cargo for the same price from Buffalo to New York.

FIFTH. Under the foregoing original affreightment contract, the owners of the cargo were protected by having bound H. Morse & Co., and Charles E. Wager, by contract to transport the cargo safely from Buffalo to New York, and under the collateral or sub-affreight-

ment contract H. Morse & Co. had protected themself by having bound the appellant Charles E. Wager to transport the cargo for the same price from Buffalo to New York. Hence, in case of loss, the appellant Charles E. Wager would be the only one who would have to suffer. He, therefore, was the person who was most concerned in securing insurance, because he had no redress over, in case of loss against any third party.

Under the method, as above set forth, of insurance, H. Morse & Co., as intermediary men or brokers, doing business for boatmen for a commission, secured the above set forth open or running policy for the season, in which the libellants agreed to insure "on account of H. Morse & Co., for whom it may concern, the several persons whose names were thereafter endorsed thereon, as owner, advancer, or common carrier." This insurance was secured by H. Morse & Co. at the special instance and request of the appellant Charles E. Wager, and for his benefit, as well as for their own, and the premium was paid in the first instance by H. Morse & Co. to the insurance company, and charged by H. Morse & Co. against the appellant Charles E. Wager, and an order taken from Charles E. Wager upon the consignees E. B. Brooke & Co. to pay such money out of his freight back to H. Morse & Co.

SIXTH. While Charles E. Wager and H. Morse & Co. were insured against loss, in case of damage or loss of the cargo, they being liable therefor, as common carriers to the owners, the owners, in order to protect themselves, and secure the loss, in case the insurance company had to pay it, required that the certificate insuring Charles E. Wager and H. Morse & Co. be delivered to them, so that they could collect such insurance from the company directly, and apply it to pay the claim which they would have against the respondents Charles E. Wager and H. Morse & Co., in case the cargo was lost and not insured.

It is further to be borne in mind that up to the time

of the loss of this cargo no money had been advanced by the owners of the cargo to pay insurance premiums or any other expenses; all the money that had been paid was paid by H. Morse & Co. The shipper and consignee owners of the cargo, that is, W. Meadows and Armour, Plankinton & Co., paid no money, and were to pay no money until the cargo was safely transported to New York. Hence, it cannot be said that the owners of the cargo paid any premium or in any way became responsible for any premium. The best evidence of this is that, in case the premium had not been paid in this case, the facts do not show that the libellants in this action could have brought a suit against the owners of the cargo therefor, because there is no evidence in the case that H. Morse & Co. acted for or in behalf of Armour, Plankinton & Co., or the owners of the cargo, in making the contract of insurance. They acted wholly for themselves and for the appellant Wager.

Under the foregoing insurance contract, the insurance effected in the name of H. Morse & Co. was to insure to the benefit of all concerned—that is, for the benefit of all for whom H. Morse & Co. acted in obtaining the insurance.

Undoubtedly the learned Judge WALLACE's interpretation on the clause "on account of H. Morse & Co., for whom it may concern" is correct.

"It is to be read as though the libellants undertook to insure Morse & Co. for themselves and those whom they might represent in procuring insurance, and also undertook, at the request of Morse & Co., to insure any other persons having an interest as owners, advancers or common carriers, whose names and interests should thereafter be endorsed upon the policy. When the names of Morse & Co. were inserted in it, it was appropriate to meet the different classes of transactions

which an insurance by them might represent. It was such as would enable them to effect an insurance in their own name when they had any interest in the risk as advancers or carriers, or to obtain insurance for the owner, advancer or carrier, and in his name, if they desired or had no interest themselves. Upon the correct construction, insurance effected in the name of Morse & Co. was to insure to the benefit of all concerned—*that is, for the benefit of all whom they acted in obtaining insurance;* and when insurance was not effected in the name of Morse & Co. the name of the person to be insured, with a statement of his interest, was to be endorsed on the policy, and he would thereby become the assured. Upon any other construction the words 'for whom it may concern' are nugatory. Insurance in the name of another might some time be desirable when Morse & Co. had no interest in the transaction other than that of agent for procuring cargoes, and insurance upon them for others for a commission."

The Sydney, 27 Fed. Rep., 124.

This clearly explains the clause "on account of H. Morse & Co. for whom it may concern." When H. Morse & Co.'s name was endorsed upon the policy, or the book kept for that purpose as in this instance, then it insured H. Morse & Co., so far as their interest was concerned, and any other person whom H. Morse & Co. acted for and intended to insure when the insurance was secured.

Whom did H. Morse & Co. intend to insure when they secured the policy?

The only way to determine this intention is by the evidence of H. Morse & Co. themselves, and by the evidence of Henry S. Sill, the general agent of the libellants, who issued the certificate and open policy of insurance, and by the evidence of the appellant Charles E. Wager.

HENRY MORSE swears:

"Q. Have you ever had any conversation with insurance people with reference to this class of insurance, as to the persons known or intended to be secured by it? A. I have.

"Q. In connection with taking out policies I mean? A. Yes, sir; *and it was understood that the captain of the boat was insured.*

"Q. Was it stated in substance to that effect? A. It was stated in substance to that effect.

"Q. Stated what? A. That the captain of the boat was insured" (Record, p. 54).

Again says the same witness:

"When I went to Worthington & Sill, which was the same day, and got this certificate, I was doing it pursuant to the contract I had just made with Meadows, *and to protect ourselves and the captain.* * * *

"Q. Now, will you be kind enough to tell me in what sense either yourself or the owner of the boat got the benefit of that insurance? A. With the understanding with the insurance company and ourselves, as common carriers, and the captain are protected when we take a policy from them; protected from any loss—protected against any loss—that may occur while the cargo is in transit, after being insured, from Buffalo to New York or to any other port" (Record, pp. 56-7).

ALANSON MORSE, the other member of the firm of H. Morse & Co., swears:

"Q. Now, whom did you intend to insure by the clause 'for whom it may concern' in this policy, when you issued the policy to H. Morse & Co.? A. Capt. Wager and myself. I at once endorsed the certificate over to the owners of the grain to secure them, *as collateral security* that we would deliver that cargo in New York all right. We didn't know who the owners were when we took it" (Record, p. 37).

HENRY S. SILL, one of the firm of Worthington & Sill, the general agents of the libellants, swears:

"Q. In insuring in this way, receiving this application and making that entry in your policy book, do the company understand that the design is on their part to benefit anybody else besides Mr. Morse; do they understand that that was designed to protect the boat against loss as the carrier of the goods, as well as Morse & Co.? A. Yes, sir" (Record, p. 43). * * * "I understand that the premium that is paid to us comes from the captains" (Record, p. 49).

CHARLES E. WAGER, the appellant, swears:

"Q. Whom did you have the conversation with; whom did you ask in Morse & Co.'s office to get an insurance on that grain for your benefit? A. Mr. Alanson Morse and Mr. Fero.

"Did you ask Mr. Fero? A. I asked him as much as I did Mr. Morse.

"Q. Did you ask Mr. Morse to get the insurance on that cargo for your benefit? A. I said it to them both.

"Q. Did Mr. Alanson Morse hear you state that? A. Yes, sir.

"Q. Was that before or after your load started? A. It was before the load was on the boat.

"Q. What reply did he make? A. He told Johnny to attend to it and Johnny said he would" (Record, p. 35).

Again says the same witness:

"Q. What did you do about insurance with either of the Morses? A. I asked them in what company my grain was insured, as I had generally done so in cases.

"Q. What did you say then? A. I told them to insure my grain in a good safe company" (Record, p. 33).

This evidence shows beyond question that H. Morse & Co., who made the contract of insurance with Worthington & Sill, the general agents of the libellants, intended, when they made the contract of insurance, to insure for their own benefit and for the benefit of the appellant Charles E. Wager as carriers. There is no evidence in the case which shows any intention whatever to insure Armour, Plankinton & Co. as owners of the cargo.

Under the foregoing insurance contract and the custom of doing the business, it was not necessary nor essential in any way that Armour, Plankinton & Co., the owners of the cargo, should be insured, nor were they insured in this instance.

The method of making the affreightment contract and securing the several parties thereto, as well as the form of the certificate of insurance and the open policy, all indicate that the only persons intended to be insured were the common carriers and the advancers in this instance. The certificate of insurance, which insured the common carriers and the advancers in this case, made the loss payable to H. Morse & Co. or order. H. Morse & Co. endorsed this certificate of insurance in blank, and delivered it over to the shipper. By such endorsement and delivery of the certificate the insurance company, in case of loss, were instructed to pay the loss, which was due under the contract to the common carriers and advancers, over to the holders of the certificate. That is, the holders of the certificate, who were the owners of the cargo, received payment of the loss which under the insurance contract was due to the common carriers. In this way, while the owners of the cargo were not insured, they were secured by the insurance of the common carrier. They received the loss instead of the common carriers, and by the receipt of the loss the common carriers were relieved from their

liability to them, as they were liable to the owners of the cargo for the value thereof as common carriers, and therefore as insurers.

POINTS.

First.

It is not necessary in this case to determine whether or not the cargo was lost through the negligence of Charles E. Wager, the master and owner of the boat "Worden." The bill of lading in this case is what is called a clean bill of lading; that is, the common carriers, H. Morse & Co. and Charles E. Wager, signed a bill of lading, or affreightment contract, in which they agreed to safely transport said cargo from Buffalo to New York, without excepting the dangers of the seas, or any other accident or contingency which might occur. Therefore, they were common carriers, with all the liability which attaches to common carriers; that is, they were insurers of the cargo, and if the cargo was not delivered, regardless of whether the failure to deliver was owing to any fault on the part of the captain or not, they were bound to make good any loss to the owners by failure to perform the contract of delivery. Hence, if H. Morse & Co. and Charles E. Wager were not insured in this case, and Armour, Plankinton & Co. were insured, then this suit is properly brought, and the respondents must respond in damages to the value of the cargo, even though they were guilty of no negligence. But if Armour, Plankinton & Co. were not insured, then, as above stated, this libel must be dismissed, because it proceeds upon the theory that the libellants are subrogated to the rights of Armour, Plankinton & Co., and that Armour, Plankinton & Co. were the only parties insured.

And again, if H. Morse & Co, and Charles E. Wager were insured, the libellants, having paid the loss under the terms of the insurance policy for their benefit, are estopped from recovering it back from the insured, and the libel must be dismissed. It follows, therefore, that the only question in this case is one of insurance.

Second.

Armour, Plankinton & Co. were not insured under the conditions of the insurance contract hereinbefore set forth. Therefore, the libel must be dismissed, because it does not proceed upon the theory that the libellants have succeeded to any rights by subrogation, except those of Armour, Plankinton & Co.

It will be observed that there is no evidence in the case which shows that there was any intention on the part of H. Morse & Co. to insure Armour, Plankinton & Co., as owners of the cargo, at the time the certificate of insurance was issued. On the contrary, the evidence shows that it was the intention of H. Morse & Co. to insure themselves and Captain Wager.

Again, the certificate of insurance does not show that Armour, Plankinton & Co. were intended to be insured. The form of the certificate indicates, and is proof, that it was given for the purpose of endorsing over to any person who should become legally possessed of the bill of lading, the payment of the loss under the insurance policy of H. Morse & Co., and the captain of the boat, in case there was a loss to the cargo while *in transitu* in-board the boat "William Worden." In other words, the certificate of insurance, which was endorsed in blank by H. Morse & Co., and delivered to W. Meadows, and by W. Meadows forwarded with the bill of lading, was neither more nor less than collateral

security, by the assignment of the payment of the loss, in case there was a failure on the part of the common carriers to deliver the cargo in accordance with the terms of the bill of lading. This is clearly brought out by Alanson Morse, who says :

"I at once endorsed this certificate over to the owners of the grain to secure them—as collateral security that we would deliver that cargo in New York all right. We didn't know who the owners were when we took it." (Record, p. 37.)

But by going a step farther, it will clearly be seen that Armour, Plankinton & Co. were not insured. Had Armour, Plankinton & Co. assigned the bill of lading which they received in this case from W. Meadows, and with it this certificate of insurance, which Meadows received from H. Morse & Co., would there have been in this case any doubt but that the assignee of Armour, Plankinton & Co., holding the bill of lading and the certificate of insurance, endorsed in blank as in this case, could have collected the loss under said certificate of insurance from the libellants herein equally as well as Armour, Plankinton & Co ? To hold, therefore, that Armour, Plankinton & Co. were insured would be equal to holding that Armour, Plankinton & Co.'s assignees of said bill of lading, and said insurance certificate, were also insured ; and that each successive assignee would also be insured, since the bill of lading with the certificate could have been assigned many times before the cargo could have reached New York, after it was taken in-board the boat "William Worden."

Moreover, it is evident that there was no need of insuring Armour, Plankinton & Co. in this case. H. Morse & Co. and Charles E. Wager, being common carriers, were liable to the owners of the grain for the full value thereof as insurers, and when they themselves insured the cargo for their own benefit, and endorsed over the payment of the loss, if any, to the owners of the cargo, they thereby secured the owners of the cargo and relieved themselves from liability in case of loss.

The clause in the open policy, which reads " do insure on account of H. Morse & Co., for whom it may concern, the several persons whose names are hereafter endorsed hereon as owner, advancer or common carrier," does not necessarily imply that the owners must be insured, except when H. Morse & Co. intended to have the owners insured when the certificate was issued. In this case H. Morse & Co. did not intend to have the owners insured at the time the certificate was issued, nor was it necessary. It was only necessary to insure the common carriers, who were H. Morse & Co., and Charles E. Wager, and then endorse their certificate of insurance, ordering the insurance company, in case of loss, to pay the loss over to the owners of the cargo, and thereby relieve themselves, as above said, from liability as carriers.

Third.

The libellants, having paid this loss under the terms of the insurance policy to the holders of the certificate, who were Armour, Plankinton & Co., for the benefit of the assured, who were the common carriers, to wit, H. Morse & Co. and Charles E. Wager, are now stopped from recovering back from H. Morse & Co. and Charles E. Wager the moneys which they, under said contract, agreed to appropriate for the indemnification of said common carriers against the very loss which had arisen. Of course, there can be no doubt as to this conclusion. A voluntary settlement and payment are in general binding, and cannot be ripped up and set aside except upon some of the special and legal grounds therefor, such as duress, fraud, or mistake of fact.

2 Greenl. Evidence, Sections 85, 120-3.
Elliott vs. Swartwout, 10 Pet., 137, 154.
Nichols vs. U. S., 7 Wall., 128.

Upon either of the above grounds it might be set aside, doubtless, in an action against the insured, but only upon appropriate allegations in the complaint, directly charging fraud or mistake of fact and appropriate proofs thereof.

Again, the policy does not insure against *negligence* of the master, &c. (p. 62). The 11th finding of the Court below is that the loss occurred through such *negligence* (p. 72). If this be so, the policy did not attach, and there can be no subrogation. The cases (17 How., 152, 155; 1 Wood's Jr., 72; 17 Fed. Rep., 919), referred to in the Sydney opinions, are all cases where the loss occurred *within* the terms of the policy, and not under one of the exceptions therein contained, as in this case.

Fourth.

H. Morse & Co. and Charles E. Wager, the common carriers under the original bill of lading, were both insured, and were the only parties insured under the terms of the insurance contract herein.

It was held by the Court, in the Sidney case, that H. Morse & Co. were insured to the extent of their interest as carrier and for advances. Says the learned Court: "The certificate and policy are to be read together, and, so read, form a contract between the libellants and Morse & Co. to insure the latter 'for whom it may concern.' This was an insurance for Armour, Plankinton & Co. to the extent of their interests as owners of the cargo, because the proofs show indisputably that Morse & Co. obtained the insurance at the request and for the protection of Armour, Plankinton & Co. *It was also an insurance for the benefit of Morse & Co. to the extent of their interests as carriers and for advances.*"

The Sidney, 27 Fed. Rep., 124–5.

This, of course, disposes of this case so far as H. Morse & Co. are concerned. If H. Morse & Co. were insured under this contract to the extent of their interest as carriers and for advances, the libellants cannot now sue them to recover back the moneys which they have already paid Armour, Plankinton & Co., for the benefit of H. Morse & Co., as one of the insured.

In fact, the proofs show, and the libellants allege in their libel, that they paid H. Morse & Co. $670, which was the amount of the interest of Henry and Alanson Morse in said cargo, freight and advances. Had not H. Morse & Co. been insured, the libellants would not have paid them $670. The libellants not only paid H. Morse & Co. $670, but took a subrogation receipt from H. Morse & Co. therefor (Record, p. 60). Thereby, the libellants admitted that H. Morse & Co. were insured.

It may be argued by the learned counsel for the libellants that H. Morse & Co. were insured for the money which they advanced, but were not insured as carriers. This would be wholly untenable, because if H. Morse & Co. were insured at all they were insured to the extent of their liability as carriers, as well as to the extent of their interest as advancers, because such are the terms of the policy. Certainly, if H. Morse & Co. paid the premium to insure the cargo to its full value—that is, $9,875, they certainly must have intended to insure themselves against all the loss to which they were liable under the affreightment contract. This is too obvious to admit of further discussion.

That Charles E. Wager, under the proofs in this case, was also insured is equally clear and palpable. The learned Court, in the case of the "Sidney," laid down the rule of law which controls in this case in the following language, the soundness of which cannot be questioned: "Although the general rule is that, if a policy insures the interest only of the person named in it, no other person can show that it was also intended to cover his interest, it is otherwise if the policy con-

tains the phrase, 'for whom it may concern;' *and under such a policy the intention of the person who effects the insurance determines the application of the clause.* The insurance effected by him insures all who have an insurable interest in the property to the extent of their interests, where there is previous authority or subsequent ratification of an insurance obtained for them. This is so whether the intention of the person effecting the insurance is known to the insurer or not; and the persons whose interests are thus insured may sue upon the policy in their own name, and a recovery by one insures to the benefit of all, and bars a recovery by the others. The phrase ordinarily applies, however, only to those who are contemplated at the time of the insurance, and who then had an insurable interest in the subject matter (1 Pars. Ins., 45; Hopper vs. Robinson, 98 U. S., 528; Henshaw vs. Mutual Safety Ins. Co., 2 Blatchf., 99; Hermann vs. Louisiana State Ins. Co., 7 La., 502; Duncan vs. Sun Ins. Co., 12 La. Ann, 486; Buck vs. Chesapeake Ins. Co., 1 Pet., 151; Rogers vs. Traders' Ins. Co., 6 Paige, 583)."

The Sydney *(supra)*, 125.

Under the foregoing authorities, and by giving effect to the clause in the insurance policy in this case, "for whom it may concern," and under the facts in this case as proven, there can be no question at all as to the fact that Charles E. Wager was insured. Henry Morse and Alanson Morse, who effected the insurance, both swear that they effected the insurance for the benefit of themselves and Capt. Wager. Henry S. Sill, the general agent of the insurance companies, who issued the open or running cargo policy, and the certificate of insurance, to H. Morse & Co., swears that the insurance was for the benefit of the captain of the boat, and Charles E. Wager, the appellant, swears that before he took the load on the boat "Worden" he requested Alanson Morse to get the cargo insured for his benefit, and in his presence Alanson Morse instructed his clerk

to look after it, and the clerk, in his presence, said he would.

Charles E. Wager also signed the original bill of lading with Henry Morse & Co., and was therefore liable as common carrier, and had an insurable interest in the cargo as such; so that, under the above doctrine laid down by this Court, there can be no longer any question as to the insurance of the appellant, Charles E. Wager. All the conditions, which under the doctrine above laid down were required, were fulfilled. That is, at the time the insurance was effected, Charles E. Wager had an insurable interest as common carrier; when the insurance was effected H. Morse & Co., who effected the insurance, effected it for the benefit of Charles E. Wager, at his request.

The learned Court held, in the case of the Sydney, that "the proofs do not show that the interest of the carrier was intended to be insured by Morse & Co. when they applied for the insurance and procured the certificate," and that while "considerable evidence was elicited from the witnesses for the purpose of showing usage among shippers, insurers and boatmen, at Buffalo, to the effect that insurance procured under circumstances similar to those in this case is understood to protect the carrier as well as all other persons interested in the safe transportation of the cargo, it is not persuasive in the mind of the Court in view of the fact that the insurance was procured at the request of the owners and as a condition of the contract for transportation, *and the further fact that there was no conversation between Morse & Co. and Charles E. Wager, the master of the 'Worden.'*"

The Sydney *(supra)*, 126, 127.

The last clause above quoted explains the reason why this learned Court did not find that the appellant, Charles E. Wager, was insured in the Sydney case. The appellant Charles E. Wager was not called as a witness on the trial in the Sydney case, and the

fact that he had instructed H. Morse & Co. to insure the cargo for his benefit did not, therefore, appear in that case. *In this case that fact does appear*, and is shown by the evidence of two witnesses, who were not examined in the Sydney case at all; that is, by the evidence of Charles E. Wager himself, who swears, as above stated, that he directed the cargo to be insured for his benefit, before it was put in-board the boat "Worden," and the evidence of Alanson Morse, who swears that under the clause "for whom it may concern" he intended to insure the cargo for the benefit of Capt. Wager as Well as Morse & Co.

It is further to be observed in this connection that the evidence in this case is that there was no direct communication between W. Meadows and H. Morse & Co, in which W. Meadows instructed H. Morse & Co. to insure the cargo. It appears in this case, and the evidence is, that W. Meadows assumed only that H. Morse & Co. would get the cargo insured, under the ordinary course of doing the business. That is all. But there is not a single word of evidence in the case which shows that there was any direction that H. Morse & Co. should get the cargo insured for the benefit of Armour, Plankinton & Co., or the owners of the cargo. A careful examination of the evidence in the Sydney case will also show that there never was any direct request by Mr. Meadows to Morse & Co. to insure the cargo for the benefit of the owners, or Armour, Plankinton & Co. When the evidence is carefully examined in that respect it will be seen that it was an assumption that Morse & Co. would get the cargo insured, and that W. Meadows would require an endorsement of the certificate of insurance over to him before he would give a cargo for shipment; that is, only an assignment of the payment of the loss to the owners of the cargo in case there was a loss of the cargo while *in transitu*.

Fifth.

It was error for the Court to refuse to pass upon the findings presented by the appellant (see Record, top, p. 22).

The "Francis Wright," 105 U. S. (381), 387.

Lastly.

The judgment as against the appellant Charles E. Wager should be reversed, and the libel dismissed with costs to appellant Wager in all courts.

Respectfully submitted,

J. A. HYLAND,

Proctor for Appellant Wager,

No. 45 Broadway,

New York City, N. Y.

LAW ASSOCIATION

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SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1892.

CHARLES E. WAGER,

Appellant,

vs.

THE PROVIDENCE, WASHINGTON INSURANCE CO., OF PROVIDENCE, RHODE ISLAND, *et al.*,

Appellees.

No. 262. 41

THE PROVIDENCE, WASHINGTON INSURANCE CO., OF PROVIDENCE, RHODE ISLAND, *et al.*,

Appellants,

vs.

HENRY MORSE AND ALANSON MORSE,

Appellees.

No. 278. 49

BRIEF

ON BEHALF OF INSURANCE COMPANIES.

EDWARD D. McCARTHY,
Proctor for Libellants, &c.

Supreme Court of the United States.

THE PROVIDENCE WASHINGTON INSURANCE COMPANY of Providence, Rhode Island, and THE SECURITY INSURANCE COMPANY, of New Haven, Connecticut,
Libellants and Appellants,

vs.

CHARLES E. WAGER,
Respondent and Appellant,

Impleaded with HENRY MORSE and ALANSON MORSE,
Respondents and Appellees.

The following facts are not disputed :

In May 1883, Armour, Plankington & Co. were the owners of a cargo of wheat, which they desired to send from Buffalo to New York.

The value of this grain was $9,211.75, while freight-charges, and advances, increased it to the sum of $9,875 (fol. 80).

The certificate of insurance was drawn to cover this aggregate value (fol. 118); but the papers of abandonment show that this amount covered two distinct interests, to wit : First, the owner's interest to the extent of $9,211.75 (fol. 106); and Second,

Supreme Court of the United States.

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the carrier's interests, meaning thereby freight, and advances, which were a lien on the cargo, to the extent of $520 (fol. 105).

Thus also runs Finding Fourteen (p. 73).

See also the testimony of Sill (fol. 79); see the testimony of Morse, fols. 99, 103, 104 and elsewhere.

William Meadows, who resided in Buffalo, was the agent of the owners of the cargo (fol. 67).

Henry Morse & Alanson Morse, defendants, were carriers, and forwarders, of grain from Buffalo to New York, and did business under the name of Morse & Co. (fol. 89).

On the 17th of May, 1883, Meadows, acting for the cargo-owners, and Henry Morse, acting for the carriers, made a contract of this purport:

For, and in consideration of $395, *the payment of which was made a lien on the cargo*, the carriers undertook to get the cargo insured, and to transport it to New York.

The premium of insurance, which amounted to $14.82 (fol.97), was a part of the $395 paid, or to be paid, by the cargo-owners, on its delivery in New York.

By this contract, the carriers were under the same obligation to insure the cargo for the owners' benefit, as they were to transport it to New York.

The testimony, on this point, of the contracting parties, Meadows and Morse, is explicit, and almost identical. Meadows' testimony is to be found in folios 67–69. Morse's testimony is to be found in folios 94, 96–104.

Morse & Co. already had an open policy (fols. 71, 108), issued to them by the libellants at the beginning of the season, with the intention to cover "all whom it might concern;" that is to say, all per-

sons who might employ Morse, as carrier, to insure and to transport their property.

Morse says that it was pursuant to this contract with Meadows (fol. 98), that he caused this cargo to be insured, and got the certificate of insurance, which he immediately gave to Meadows, the cargo-owner's agent.

Meadows says (fol. 69), that such was the contract; that the insurance certificate was to be furnished by Morse & Co. and handed over to him, Meadows, the premium, therefor, having been paid. This was to be done at the time the contract was made. Morse also says (fol. 98), that at the time this contract was made between himself, and Meadows, nothing was said about any person's having the benefit of the owner's contract of insurance.

At folio 99, and elsewhere, the witness Morse declares what interest the carriers had in, and to, the contract of insurance. See also, on this point, Meadows' testimony (fol. 70); see testimony of Sill (fol. 80 and elsewhere).

We remark, in passing, that the testimony just cited maintains the Seventh Finding of Fact, which reads as follows:

"*Pursuant to the contract made between Meadows, the shipper and agent of the cargo-owners on the one hand, and Morse & Co., the carriers, on the other hand, the latter agreed and undertook, for, and in consideration of, the payment of $395.00, the payment of which was made a lien on the cargo, to transport the same to New York, and to insure the owners' interest in said cargo.*"

The same testimony fully maintains the Fourteenth Finding of Fact, which is as follows:

"*June 26th, 1883, the libellants paid to Armour, Plankington & Co., the sum of $9,211.75 on account of the loss of the cargo insured, and upon an abandonment by the owners to the libellants; and, about the same time, they paid Morse & Co. the sum of $520.00 in full for their interest in the cargo.*"

The aforesaid testimony, and findings, clearly call for an affirmance of the first conclusion of law, and for a reversal of the second conclusion of law, made by the Circuit Court (fol. 130).

The pleadings present but one issue, which need be discussed here.

Thus (fol. 3), the libellants claim that they are subrogated to the rights of the cargo-owners, in the value of the property insured, $9,211.75.

The separate answers of the respondents, to wit, the answer of the defendants Morse (fol. 12), and that of the defendant Wager (fol. 16), allege that this contract of insurance was taken out for the benefit of the carriers, and, therefore, that no subrogation arose in behalf of the libellants.

To the findings of the Court the defendant Wager took exceptions (fols. 131–133).

One of these exceptions, only, will be noticed; this is the third exception (fol. 133).

The respondent Wager therein contends, that the Seventh Finding of Fact, hereinbefore quoted, should read as follows:

"Pursuant to the contract made between Mead-

"ows, the shipper and agent of the cargo-owners, on "the one hand, and Morse & Co. and Charles E. "Wager, the carriers, on the other hand, the latter "agreed, and undertook, for and in consideration of "the payment of $395, to transport the same to "New York."

Argument in No. 263.

First.

The Supreme Court will consider only the findings of fact, and the conclusions of law.

If the former sustain the latter, the decree will be affirmed, however slight the evidence may be on which the findings of fact are based. Therefore, the only question now to consider is, whether or not the Seventh, Tenth, Fourteenth and Fifteenth findings of fact, support the First conclusion of law.

In connection with the Seventh finding of fact, should be read the following extract from the Third finding of fact, to wit: "*They, (the carriers), thereupon applied to one Meadows, who was an agent for Armour, Plankington & Co., for a cargo, and agreed with him to transport seven thousand nine hundred (7,900) bushels of wheat, from Buffalo to New York * * * and to insure the same for five cents per bushel. Thereupon they entered into a contract with the boat-owner * * * for transportation of the cargo to New York, and procured the certificate of insurance aforesaid, and indorsed and delivered it to the agent of Armour, Plankington & Co. * * **"

Second.

The aforesaid findings of fact declare that the libellants had insured the cargo-owners, to the full value of their property, in the sum of $9,211.75; that the foregoing insurance, as we now describe it, was the essential fact in the proceeding against the carrier's boats, as well as in the present action; that immediately after the property insured had been lost, the libellants paid to the owners the amount for which it had been insured; that, thereupon, they took from the cargo-owners, the assured, an abandonment of all rights; that the libellants now stand upon this abandonment and implied subrogation: that at the time of the abandonment, one of the rights held by the assured, in connection with this loss, was a cause of action against the defendant Wager.

It is needless to argue, that these propositions maintain the first conclusion of law.

Third.

But the defendant Wager, excepts to the Seventh finding of fact (fol. 133), and propounds, in lieu thereof, that "*in consideration of the payment of $395, the carriers undertook to transport the cargo to New York.*"

The only difference between the seventh finding of fact, and the amendment thus proposed is this; that in the finding aforesaid, the sum paid includes premium for insurance, as well as freight money.

Fourth.

The contract of insurance was made between William Meadows, acting for the cargo-owners, and Henry Morse, acting for the carriers and forwarders. Both testified.

Meadows says: "*I contracted for the transportation and insurance of this cargo at Buffalo. * * * I made the contract with Morse & Co., whose names are attached to the bill of lading (fol. 67).* * *

The insurance certificate is brought to me at the time the bill of lading is brought, or before. We usually require the certificates before, so that we know that the boat is insured before she is loaded, or by the time she is loaded. I would not accept the bill of lading without the certificate. The premium is paid by the carriers, Morse & Co.; they pay the Insurance Company. The account is made against them. Their contract with me is to take that cargo to New York, as well as to insure it. * *"* (fol. 68).

*The rate agreed upon for transportation to New York includes the paying of premium. * * That is a part of the contract, as we understand it. * * When the insurance certificate is handed to me, the endorsement, like what is on Exhibit 2, is made upon it at that time; it is endorsed over to me in this way. That is done at the time, and not after the loss happens; that endorsement is made at the time the certificate is delivered to me. * * Such was the state of facts in this case. * * * **

Q. (By the Court.) Have you any knowledge whatever in regard to any interest of the owners or captains of the boat in the insurance; or as

respects the payment of the premiums of insurance.

A. Nothing, only what I have stated.

*The captain is supposed to have his freight-list insured in this particular policy—that is his advances, * and the freight list, * * to the amount of probably five hundred odd dollars, and he would claim that; they usually take out a separate policy for that claim, but in this case it must be all included in the one policy; * * in this case the advances and freight-list are all merged in one certificate; they are different things, but they are included in the one certificate (fol. 70).*

Q. *(By the Court.) Have you ever considered at all in what form the insurance effected in the way you have mentioned, was to be made available as distinguished from the fact that it was to become available to the consignees?*

A. *I suppose the insurance was available only to the owners of the property; I never looked upon it in any other way. * * **

*I did not contract with Morse & Co. to give them the benefit of that insurance, or the boat the benefit. * * **

I did not intend to do so" (fol. 88).

Says Morse: "*We consider ourselves as common carriers, together with the captain, Mr. Meadows, the shipper, was never brought in contact with the captain at all, never saw him (fol. 96).*

*We undertook and agreed with Mr. Meadows to transport his grain and get it insured. * * **

*The agreement with Meadows was, we were to be paid a certain sum for taking the cargo to New York and getting it insured. In this particular case, $395. * * **

The sum thus paid was for transportation and insurance premium, and was intended to cover both (fol. 97).

*For $395 * * we were to get the cargo transported to New York, and get it insured. * * The cargo is the foundation of the contract.*

*Then, in addition to that, the $200 freight-charges that we have advanced on the part of the cargo, or are about to advance, is put in the bill of lading, making in all, $516.94, and this becomes a lien on the cargo. * * **

*At the time we made this bargain with Mr. Meadows there was nothing said about ourselves or any other person having the benefit of that insurance. * * **

When I went to the insurers, which was the same day, and got this certificate, I was doing it pursuant to the contract that I had first made with Meadows, and to protect ourselves and the captain.

*It was not immediately after we got the certificate, * * * that we took it back to Meadows. * * * It was within a reasonable time, as soon as the figures had been ascertained. We did that pursuant to the contract which we had made with Meadows. When the loss occurred, and the money had been paid over to Meadows, we pretend that we had a right to that money, so far as our interests were concerned—our interest as advances—but no other right. Our interest as advancers amounted to $500.00.*

We don't pretend that our firm had any right to the residue of the money that was paid to Armour, Plankington & Co.; we did not own the property. I don't think the captain of the boat had any right to that $7,000 or $8,000. That was

*paid to Armour, Plankington & Co. * * * There was no contract that gave him the right to that money, or any part of it. * * * I cannot say that there was anything in the contract with Meadows & Co., that I know of, that cut off the Insurance Company's right of subrogation, that they would have on paying Armour, Plankington & Co.*" (fols. 98 and 99).

See also his testimony in fol. 104, as follows :

"*I meant that the money that was paid to Armour, Plankington & Co., was on the loss. They being the owners of the grain, that portion of the money would go to them, we receiving the amount of our advances out of the loss, and the balance of the money belonging to the owners, as understand it, should go to them.*"

Fifth.

The testimony of Messrs. Morse and Meadows is sustained by the receipt given by the carriers, in abandonment (fol. 105). Herein the carriers expressly say: "Received $520 *in full payment* of *all claims for loss on our interest in the cargo of wheat of boat Wm. Worden.*"

Then follows the usual assignment of claims and demands.

The cargo-owners, also, gave a similar receipt for the sum of $9,211.75, and a similar assignment of claims and demands (fol. 106).

These receipts in abandonment, in and of themselves, clearly show the scope and nature of the contract of insurance, and support the above-named findings of fact.

They show that the carrier was covered for his freight, and advances, in the sum of $520; while the owners were covered to the extent of the value of their property.

We submit, therefore, that the seventh finding of fact, to which the defendant Wager excepted, is sustained by the evidence.

No request was made by the defendants, or any of them, for a finding of fact, in respect of the law of custom, if there was any, which prevailed in the port of Buffalo at the time this contract was made, and no finding of fact was declared on that question.

Therefore, it cannot now be discussed, although three-fourths of the testimony taken in the several courts below, was wasted on this fruitless topic.

Every contention, indeed, in behalf of the carrier's right to this contract of insurance, has been built up on this pretended law of custom, in the port of Buffalo.

The defendants do not now deem it worthy to be noticed, even in the form of a request.

The general policy given by the libellants to Morse & Co. provided (fol. 109), that the insurers should not be liable for "want of ordinary care, and skill, in navigating the boats."

This was a provision, in their own favor, which the insurers could have waived, and which they did waive, by the payment of the loss.

The Monticello, 17 *How.*, 152, 155.

Ins. Co. vs. *The C. D., Jr.*, 1 *Woods*, 72.

The Sun Mutual Ins. Co. vs. *Miss. V. T. Co.*, 17 *Fed. Rep.*, 919.

Moreover, the bill of lading (fol. 115), makes no exceptions, whatever, to the carrier's common law liability.

It does not appear, from any findings, that at the time when the insurers paid the respective losses, they knew, or had reason to believe, that the carriers had been guilty of negligence, in navigation.

There is no finding of fact to show that at the time the loss was recognized by the libellants, it had not arisen from misfortune, rather than negligence.

The libellants are in the place of cargo-owners, who have received full satisfaction; and the defendants cannot object that they are called upon to pay the subrogated claimants, seeing that they would have to pay but once.

The attention of the Court is respectfully called to the opinion of the Circuit Court in the case of the Sydney & Worden, 27th Fed. Rep., pp. 124–125.

Argument in No. 278.

The Third, Seventh, Ninth, Tenth, Fourteenth and Fifteenth Findings of Fact refute the Second Conclusion of Law and call for its reversal.

I.—The cause of action set forth against the defendants appears in one, and the same, libel. The same answer (so far forth, as concerns the aforesaid Findings), is made by all the defendants (fol. 12; fol. 16).

There is no distinction, whatever, made in the evidence between the rights and duties of one defendant and the other defendants.

There is but one group of Findings.

Seeing that the three defendants signed the same bill of lading, and were all personally liable to the cargo-owners, it is impossible that the aforesaid Findings can be prejudicial to one of them, and favorable to the others.

II.—Therefore, if the Findings of Fact support the First, they certainly refute the Second Conclusion of Law.

III.—The Findings of Fact do not distinguish between the defendant Wager, and the defendants Morse. If one is liable, all are liable; because, they stood in the same relation to the libellants.

IV.—The Seventh and Tenth Findings of Fact, declare that the *owner's* interest in the cargo was covered by the contract of insurance, in consideration of *a premium paid by the owners.*

On these Findings, the decree ran against Wager.

But there were not *two* contracts of insurance, each covering the value of the cargo. The Findings declare for one contract only. Therefore, if the libellants were subrogated to the owners, under one contract only, they can hold all the defendants.

This is distinctly declared in the Fifteenth Finding of Fact.

The Third, Seventh, Ninth, Tenth, Fourteenth and Fifteenth Findings of fact read as follows:

(3.) "*They thereupon applied to one Meadows, who was an agent for Armour, Plankington & Co.*

for a cargo, and agreed with him to transport 7,900 bushels of wheat from Buffalo to New York on the boat Worden, and to insure the same for a freight of five cents per bushel. Thereupon, they entered into a contract with the owner of the Worden, evidenced by a bill of lading in which they were described as shippers of the cargo for transportation of the cargo to New York, and procured the certificate of insurance aforesaid, and endorsed and delivered it to the agent of Armour, Plankington & Co., and at the same time entered into a contract with him for the transportation of the cargo to New York, evidenced by a bill of lading, in which they described themselves as carriers, and Armour, Plankington & Co., as shippers."

(7.) *Pursuant to the contract made between Meadows, the shipper and agent of the cargo-owners on the one hand, and Morse & Co., the carriers, on the other hand, the latter agreed and undertook, for and in consideration of the payment of $395, the payment for which was made a lien on the cargo, to transport the same to New York, and to insure the owners' interest in said cargo.*"

(9.) "*Heretofore, to wit: on and before the 29th day of March, 1887, there was pending in the Circuit Court of the United States, for the Southern District of New York, to which it had been removed from the District Court of the same District, by appeal, a cause of action,* in rem, *instituted by these libellants against the boats Sydney and Worden, wherein process had been duly issued against said vessels.*

That cause of action arose out of the same facts as are set forth in the libel herein.

In that action the respondent Wager duly intervened and claimed the two vessels, and the respondents Henry Morse and Alanson Morse became sureties for the "Worden," and for claimants' costs.

The Circuit Court, aforesaid, decreed that the two vessels be condemned in favor of the libellants."

(10.) "*An essential fact, in the proceeding and judgment aforesaid, was that the cargo-owners had been insured to the extent of the value of the cargo, and that the libellants herein had been subrogated to the said owners' rights of action against the carriers.*"

(14.) "*June 26, 1883, the libellants paid to Armour, Plankington & Co. the sum of $9,211.75 on account of the loss of the cargo insured, and upon an abandonment by the owners to the libellants; and about the same time, they paid Morse & Co. the sum of $520 in full for their interest in the cargo.*"

(15.) "*The respondents, herein, Charles E. Wager, Henry Morse and Alanson Morse, were the carriers of the cargo aforesaid, and, as such, personally liable for its due transportation and delivery to its owners. They signed the bill of lading under which the cargo was received for transportation, and their liability reposes on the same facts as did the liability of the boats Sydney and Worden.*"

On these Findings, the following propositions securely rest :

(I.) That the contract of insurance was between the libellants and the cargo-owner only, and covered

the value of the cargo, which was $9,211.75. (The subsidiary insurance of the carriers' interest in the cargo to the extent of their lien for freight, and advances, need not be considered now.)

(II.) That after the loss occurred, the libellants paid the cargo-owners $9,211.75, which was the amount for which the owners had been covered.

The libellants thereby, and to that extent, became subrogated to the rights of the owners.

(III.) When this subrogation arose, the defendants had become liable to the cargo-owners, because of their non-delivery of the cargo.

Now, seeing that only one contract of insurance had been made covering this cargo, how is it possible that the libellants were not subrogated as against the defendant Morse, but were subrogated as against the defendant Wager?

"*If the defendants were all personally liable to the owners; if their liability reposes on the same facts as did the liability of the boats Sydney and Worden*" (15th finding); and "if *an essential fact in that proceeding was that the owners had been insured to the extent of the value of the cargo, and that the libellants herein had been subrogated to the said owners rights of action against the carriers*" (10th finding); then the defendants Morse are liable for the same reason that the defendant Wager is.

The right of subrogation is a valuable one to insurers, and, when it exists it will be recognized and enforced.

We admit that if a cargo-wner and carrier make a contract, whereby the latter stipulates for the

benefit of the former's contract of insurance, then, on payment of loss, the insurers would be subrogated to nothing as against the carrier.

Phenix Ins. Co. vs. *Erie Co., 117 U. S. R.*

But there is no finding of fact, herein, that any such contract was made between this cargo-owner, and these carriers.

The defendants do not, in their answers, set up such a contract. There is no evidence that such a contract was made. Certainly the Court will not presume in favor of such a contract, when the findings of fact do not contain it.

We also admit that the carriers of a cargo have an insurable interest in said cargo to its full value, limited to the risk they incur in transporting it.

Morse & Co. could, undoubtedly, have insured themselves to the full value of this cargo, against the risk they incurred in transporting it.

In the base at bar they did not do so; the only contract made was the one that covered the owner's interest, as the findings declare, and this was made *pursuant to the owner's request, and the premium thereon mas paid by the owner.*

The carriers could have protected themselves, as carriers, by taking out another contract and paying the consideration therefor; then there would have been two distinct contracts, each supported by a good consideration.

On this supposition, the insurers would have got nothing by subrogation against the carriers, whom they had insured.

But this right of subrogation they would have lost, because they were paid to suffer this loss, when they were paid the premium on the carrier's contract of insurance.

But where, as in this case, only one contract of insurance covers the property at risk, and only one premium has been paid, it is a benefit only to the person who made it and paid for it. It is a bold contention, surely, that the carriers shall have the benefit of a contract of insurance which they did not make, and did not pay for.

We repeat that these findings show but one contract of insurance, which covered the owner's interest in the property. The carriers' contract was to the extent of their lien only.

The opinion of the Circuit Judge is inconsistent with these findings, just as much so as is the second conclusion of law. The opinion of a Court is not equivalent to a finding of fact, and cannot be excepted to.

The statement that the carriers, Morse & Co., "were insured for their whole interest in the cargo, not merely to the extent of their interest in the freight, but as carriers, who had contracted for the safe delivery of the cargo," is contradictory to the fourteenth finding of fact, as well as to the subrogation receipt given by the carriers' (fol. 105), and to the testimony of the carrier Morse, already quoted.

Compare this statement with the opinion delivered in the case of the Sydney, 27 Fed. Rep., pp. 124–125.

The Court has jurisdiction over this appeal. The demand in the libel is for $9,211.75 (fol. 4).

By stipulation, given in open Court (fol. 34), it was agreed that a decree might be entered against the

respondents, or any one of them, for $6,175.89, with interest from May 28th, 1883, and a decree to that amount was entered against the defendant Wager, whose right to appeal is not contested.

The defendants Morse could have appealed had a decree been made against them. The right of appeal is reciprocal.

Hilton *vs.* Dickinson, 108 U. S. R., 174.

It does not appear how much the libellants got on the sale of the two boats, because no statement is given of costs, and disbursements, which were deducted from the amount paid into the registry of the Court, which was $3,100; but, assuming that no deduction whatever, had been made, still, the amount of the decree entered against the boats Sydney and Worden on the 28th of March, 1887, was $8,252.47.

This action, *in personam*, is supplementary to the action *in rem*, and the amount actually involved in controversy, is at least the difference between the amount adjudged to be due, and the amount paid into the registry of the Court.

While it is true that interest on the present claim could not be taken into account on the question of jurisdiction; nevertheless, the amount actually due the libellants, when this action was begun, makes for jurisdiction here, although it was in part made up of an interest account.

On the lowest estimate, the amount involved here is the difference between $8,252.47 (fol. 32); and $3,100.00, (*lb.*)

Finally, we respectfully submit that the decree against the defendant Wager be affirmed; and that the decree against the defendants Morse be reversed,

and a decree rendered against them jointly with the defendant Wager for the sum of $6,175.89, with interest from May 28th, 1883, besides costs and disbursements.

EDWARD D. MCCARTHY,
Proctor for Libellants.

15 Oct 99
15 Oct 899

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No. ~~878~~ 149

THE PROVIDENCE WASHINGTON INSURANCE COMPANY, OF PROVIDENCE RHODE ISLAND, AND THE SECURITY INSURANCE COMPANY, OF NEW HAVEN, CONNECTICUT,
Appellants,

AGAINST

HENRY MORSE AND ALANSON MORSE,
Appellees.

No. 13 907.

POINTS FOR RESPONDENTS AND APPELLEES HENRY MORSE AND ALANSON MORSE.

STATEMENT OF FACTS.

This is an appeal from the Circuit Court of the United States for the Northern District of New York. The action is one *in personam*, brought by the appellants as libelants to recover of the respondents, as common carriers, for damages to a cargo of grain shipped from Buffalo, on the canal boat "Worden," by way of the Erie Canal and Hudson River, to New York, in May, 1883. The cause was tried in the District Court before the Hon. Alfred C. Coxe, Judge, who rendered a decree in favor of the libelants against the Morses for $4,500.00 (fols. 23, 140), and against Wager for $6,175.00, with

costs. From this decree separate appeals were taken, one by the Morses and one by Wager to the Circuit Court of the United States for the Northern District of New York. Upon the appeal the Circuit Court reversed the decree of the District Court as to the respondents, Henry Morse and Alanson Morse, and as to them dismissed the libel (fol. 25). From this decree the appeal is taken to this court (fols. 139-143).

The libel charges the loss of a cargo of grain; that the respondents, as common carriers, were liable to the owners of the cargo, and that the libelants, being insurers upon the cargo and having paid the loss to its owners, are subrogated to the owners' claim against the respondents; it does not charge a loss through negligence. The defense of the respondents, Henry and Alanson Morse, is in substance that by the policy covering the cargo the libelants insured said respondents as common carriers against loss by reason of their liability as such, and that, therefore, although the libelants have paid the loss, they cannot be subrogated.

The facts in the case are not in dispute. They are as follows: Prior to the 17th day of May, 1883, the libelants issued and delivered to the firm of H. Morse & Co., of Buffalo, New York, a policy of insurance, reciting that "on account of H. Morse & Co., for whom it may concern," they "do insure the several persons whose names are hereafter indorsed" on the policy "as owner, advancer or common carrier on goods, wares, merchandise or country produce, on his own boat, or boats belonging to others, loaded on commission or chartered, from place to place, as indorsed thereon or in a book kept for that purpose, for the several amounts, at the rate, and on the goods, wares, merchandise or country produce, as specified in the said indorsement." The risk beginning upon "the goods, wares, merchandise or produce from and immediately following the lading thereof at the port or place of the indorsement, and continuing until the goods, wares, merchandise or produce should be safely landed at the port of destination." (See policy, fol. 108, first finding of fact, fol. 124.) On the 17th day of May, 1883, the respondents and appellants, Morse & Co., applied to the agent of the libelants at Buffalo for insurance upon a cargo of wheat to be carried on board the canal boat "William Worden," from Buffalo to New York, and requested the loss, if any, to be made payable to Morse & Co., or order. (2d finding of fact, fol. 125, fols. 72, 117.) Thereupon

the agent of the libelants entered in the book a memorandum designating Morse & Co. as the persons who effected the insurance, describing the boat, cargo and voyage, and specifying the amount insured upon the cargo on the voyage from Buffalo to New York as $9,875, and the premium as $14.82, which was paid by H. Morse & Company. (Fols. 125, 72-75.) At the same time the agents of the libelants delivered to said Morse & Co. a certificate certifying that Morse & Co. were insured, under and subject to the conditions of the policy before mentioned, in the sum of $9,875 on cargo of wheat on board boat "William Worden," from Buffalo to New York, loss, if any, payable to assured, or order. (2d finding of fact, fol. 125, fol. 118.)

The understanding of the insurance agent who issued the policy was that Morse & Co. were protected not only for their advance to the master, but against their liability as common carriers. (Ev. of Sill, fols. 74, 77.) After repeatedly saying that he knew of no one to be protected by the policy except Morse & Co. and the boatman, the agent, Mr. Sill, testifies that the companies treated the cargo *as the property of the party whom they insured, i. e.*, Morse & Co. (Fol. 81.) Mr. Henry Morse, who effected the *insurance, intended that Morse & Co.* should be protected against their liability as common carriers; in other words, intending to insure them against that liability, he insured the cargo under the policy in question. (Ev. of Morse, fols. 99, 100; also application for insurance and certificate of insurance, fols. 117, 118.) It is true that on cross-examination Morse is made to say that, not being the owners of the grain, Morse & Co. did not consider themselves entitled to more than the amount of their advance from the insurance companies (fol. 99); but this is in exact consonance with his testimony stated above, and with the facts, for, as will appear hereafter, the insurance had been assigned to the owners of the grain, and Mr. Morse so explains this evidence upon the trial of this case. (Evidence in this case, fol. 55.)

Upon receiving the certificate of insurance, Morse & Co. indorsed it, the loss being payable to their order, and transferred it to Meadows, the agent of the owner of the grain, with the bill of lading, which was signed by Morse & Co. and the master, Wager. (Fol. 99 and the certificate showing indorsement of Morse & Co., at fol. 118.)

Subsequently there was a loss which the libelants recognized as being within the policy. The libelants paid the loss as follows: To Armour, Plankinton & Co., the holders of the certificate of insurance, the value of the cargo, $9,211.75; to Morse & Co., $520. (See subrogation receipts, fol. 118, 14th finding of fact, fol. 129.)

Further material facts will be referred to under the appropriate points.

POINT FIRST.

The appellants claim to stand in the place of the owner of the property insured by reason of having paid for its loss as insurer, and brought this action against the appellees as common carriers to enforce their liability as carriers. It is immaterial in ascertaining the legal rights of the parties, whether this liability arose from the negligence of the carrier or from a breach of the contract to carry the goods.

The appellants can only claim by the right of subrogation, their libel sets forth no cause of action based upon any other ground. The insurance company cannot become the purchaser of causes of action for damages occasioned by negligence; it can only take by equitable subrogation the claim for damages against which it has insured. The appellants did not sue to recover for destruction of the goods by the negligent acts of the carrier, as no negligent acts on their part are charged in the libel.

The libel really charges what amounts to a non-delivery of the cargo, occasioned by a loss which may or may not have been a peril of navigation, and the court cannot presume without the allegations of facts distinctly charging and showing negligence, that the loss was occasioned by negligence.

The insurer has no right of action against the carrier arising out of any contract or privity between them, but his right springs solely from the contract of indemnity and is derived from the assured alone and can be enforced in his right only.

> *Per Gray, J., St. L. Rway. vs. Coml. 139 U. S. Rep. 223 p. 235.*

If the Morses were insured by the policy against their liability as carriers, it is clear that the libelants cannot recover against them; for, as insurers, they could not be subrogated to a right against the in-

sured. To permit an insurer to recover against the person he insures, for the very loss covered by the insurance, would simply make the contract of insurance an absurdity.

Phoenix Ins. Co. vs. Erie & W. Trans. Co. 117 U. S. Rep. 312.

POINT SECOND.

The appellees, Henry and Alanson Morse, were insured as carriers by the policy in question, and it therefore follows that in paying the loss the libelants have simply paid the loss against which they had insured the Morses, and consequently that they cannot recover as against them.

On the trial of the suit brought by the insurance company against the boats to enforce its rights for the loss of the cargo, as the representative of the owner, Judge Brown held that Morse & Co. had an insurable interest in the cargo to its full value as carriers, and that that interest was insured (see opinion in 23 Fed. Rep., p. 92).

Upon appeal in that case, Judge Wallace held that the policy "was also an insurance for the benefit of Morse & Co., to the extent of their interests as carriers, and for advances" (27 Fed. Rep., p. 125). Judge Wallace differed from Judge Brown only in this, that he held the policy to cover Armour, Plankinton & Co., as owners, and Morse & Co. as carriers, but that it did not cover the actual carrier, Wager; while Judge Brown held that it covered all three. Judge Wallace puts the situation very clearly, in that part of his opinion where he says (p. 126), "If the libelants were attempting to enforce a cause of action against the claimant for a breach of his obligations as carrier, and if they had insured him as carrier, as well as Morse & Co. and Armour, Plankinton & Co., it would seem very clear that they could not succeed." And in this case the same judge again said: "They [Morse & Co.] were insured for their whole interest in the cargo, not merely to the extent of their interest in the freight, but as carriers who had contracted for the safe delivery of the cargo." (Record, p. 70, fol. 123.) Further citation of authority would seem unnecessary, but to save any question as to the possibility of insuring a carrier so as to cover different interests, we would respectfully refer the Court to the following authorities, which hold that the bailee

is entitled to insure property in his possession to its full amount, and that he may recover from the insurance company the full value, although the insurance is really for the benefit of other parties:

3 Kent, 262; Hutch. Carr., sec. 429.
2 Duer, Ins., 49; Arnould Ins., sec. 107.
Hooper vs. Robinson, 98 U. S., 528, 538.
Savage vs. Corn Exchange, 36 N. Y., 655.
Harvey vs. Cherry, 76 N. Y., 436.
Waring vs. Ins. Co., 45 N. Y., 606.
Eastern R. Co. vs. Relief, etc., 98 Mass., 423.
Delahunt et al., vs. the Ætna Ins. Co., 97 N. Y., 537, 544.
Com. vs. Hide & L. Co., 112 Mass., 136, 141.

No complications can arise subjecting the insurance company to several recoveries for the same insurance, for the reason that the insurance covering the risk to a certain amount only, the company cannot be compelled to pay more than that amount, and if the payment is made to the bailee, in case the loss is payable to him, it is complete acquittance, or if the payment is made to the owner, in case the loss is payable to him, it is a complete acquittance. Thus, in this case, under the certificate, the loss being payable to the order of Morse & Co., no recovery could be had from the insurers after they had paid to the indorsees of the certificate, Armour, Plankinton & Co., for the amount so paid, although Armour, Plankinton & Co., as owners, and Morse & Co. and Wager, as carriers, were insured, the payment to Armour, Plankinton & Co. being in complete fulfillment of the contract.

That this policy covered the liability of Morse & Co. as carriers is not only held in the Sidney case in both the upper and lower courts, but we think it is conclusively disposed of by the case of *Delahunt et al. vs. The Ætna Ins. Co., 97, N. Y., 537, 544.* That case is exactly parallel to the one before this Court. There the facts regarding the insurance were the same, and the Court in disposing of the rights of the parties says (pages 543, 544):

"It is conceded by the appellant (the insurance company) that the "contract of insurance was with the plaintiffs. The question raised "by the counsel relates to the effect of the certificates. They refer "to the policy, adopt its provisions, and are enforceable only accord- "ing to its terms. In substance they embody consent of the insur-

"ers to an assignment by the assured of an interest under the policy, "and when transferred by the latter, entitle the indorsee, in case of "loss, to recover under them. The transfers, in this case, were as "collateral security, and when the debt was paid, or the purpose for "which the transfer was made accomplished, the liability of the in- "surers under their contract did not necessarily cease, but continued. "In any event, it is damage sustained by the party insured, and not "by the indorsee or party appointed to receive the money that is "recoverable from the insurers. This, upon the principle that a gen- "eral policy on goods is sufficient to cover the interests of carriers "on property intrusted to their care, would include damage done to "such property by the perils insured against, and for which they "were bound to make compensation to the owners, and also freight "and other expenses incurred by them. In the case before us the "plaintiffs are the parties insured. The amount otherwise due upon "the policy has, it is true, been reduced by money received from "other insurance on the property. It has been applied to that pur- "pose, and so their liability as carriers has been diminished, but the "freight and advances belong to them, and they remained interested "in the policy, not only to the amount of those items, but for the "impaired value of the insured property."

The cases cited by counsel for libelants, to the effect that a carrier may protect himself in his bill of lading by providing that he shall have the benefit of any insurance, are directly in favor of the respondents, H. & A. Morse, for the reason that they establish the proposition that an insurance may be made to cover not only the cargo for the benefit of the owners, but also as a protection against the liability of the carrier. If this can be done by mere agreement between the shipper and the carrier, it certainly can be done, as was done in this case, by a direct insurance against the carrier's liability, and the indorsement by the carrier of the certificate to the owner.

But the intention of the Morses in taking out this insurance was undoubtedly to protect themselves against liability as carriers and to make the loss, if any, payable to the shipper by indorsement of the certificate; this being a security for the performance of the carriers' contract always required in the ordinary course of the business, shippers of cargo so much more valuable than the canal-boat not being willing to accept the responsibility of the carriers alone, but always requiring collateral security; this being so, there was, in reality but,

one interest insured, and that is the joint liability of the Morses and Wager as carriers, created by their signing the bill of lading to the shipper, this insurance being indorsed over to the shippers as collateral security, and it follows that the payment by the insurer to the shipper, he holding the certificate of insurance, was a payment of the loss sustained by the carriers and was for the carriers' indemnity.

POINT THIRD.

The undisputed facts clearly show that Morse & Co. were insured against their liability as carriers.

(A.) The interests insured must be determined if possible from the face of the papers which constitute the contract; if they disclose a complete contract upon their face, parol evidence cannot be resorted to for the purpose of varying it. The papers constituting the contract of insurance are the policy, the application, the entry in the policy-book, and the certificate. The policy is a running one, issued "on account of H. Morse & Co., for whom it may concern," and by it the companies "*insure the several persons whose names are indorsed*" thereon, "*as owners, advancers or common carriers*," etc.

The evidence in the case shows that instead of making an indorsement on the policy, the practice of the companies is to enter the insurance, upon the application being made, in the policy-book, and to issue a certificate (see evidence of Sill, 71 to 77). This policy does not insure anything, nor can it be said to designate the person or interest insured, these factors of the contract being determined in the manner stated. Under this policy *Morse & Co.*, applied for insurance on the cargo in question, *not for the owners of the cargo*, but expressly asking for an *insurance, making the loss payable to them or their order* (see application, fol. 117). This is followed by the acceptance of the risk, and the entering up of insurance in the policy-book. The entry in this case does not show that the insurance was on account of the owners of the cargo, but does expressly show that the insurance was on account of Morse & Co., for under the column headed "On whose account," the name "H. Morse & Company" is distinctly entered (fol. 74). The agent then issued to Morse & Co. the final evidence of the contract as it thus appears, that is, the certificate. This also expressly states, not that the owners of the cargo are insured, but "that H. Morse & Co.

insured," and that the loss is "payable to the assured" (Morse & Co. as before stated in the certificate) "or their order" (fol. 118, 2d finding, fol. 125).

This would seem to make a complete contract in writing, consisting of, first, the policy, leaving the person insured undetermined; second, the Morses' application for insurance, making the loss payable to them or order; third, the acceptance of the application as evidenced by the entry insuring on account of Morse & Co., and the certificate that Morse & Co. had insured, and that the loss was payable to them or their order. This must, it would seem, amount to an insurance of Morse & Co., and to cover their liability as common carriers. If not, why is the loss made payable to Morse & Co.? Let us suppose that, notwithstanding that Meadows and Morse both understood that the owner was in some way to be protected by insurance, Morse & Co. had not indorsed the certificate in blank and turned it over to Meadows, can it be questioned for a moment that Morse & Co. could have recovered the full amount of loss under the policy? Certainly not, for the whole loss is distinctly made payable to them. They could not have so recovered the full amount of the loss upon the theory that they were insured as owners, for they were not owners, but they could have upon the ground that the policy covers their liability as common carriers, and that as such they had an insurable interest in the cargo to its full amount (see cases cited above). This is what we understand the Circuit Court held in the Sidney case, when it held that Morse & Co. were insured for advances *and as carriers*. That Armour, Plankinton & Co., were to get the benefit of the insurance, as between themselves and Morse & Co., by endorsement to them of the certificate, is, of course, conceded.

The claim of libelants' counsel that the insurance of Morse & Co. as carriers would cover freight only, is untenable for the reasons:

First. That freight is not insured in this way, freight is not mentioned.

Second. Morse & Co. had no interest in the freight, as freight, that belonged to the owner of the boat. They had a lien on the freight for their *advances*, which they were liable to lose if no freight was earned, and their *advances* were expressly insured by the policy under the clause insuring them as *advancers;* to hold that they were not insured against their liability as common carriers,

but against loss of freight only, would, therefore, make the expression in the policy insuring them as "common carriers" mere surplusage, and would deprive that expression of all meaning.

Third. As Morse & Co. were the ones insured by the terms of the contract, if they were insured to the extent of the freight only, why did the companies insure up to the full value of the cargo, and more? The freight on the cargo, 7,900 bushels of corn, at five cents, was only $395.00, while the insurance was for $9,875. The conclusion is inevitable that the intent of the parties was to insure Morse & Co. against loss of their advances, and against their liability as common carriers to the full value of the cargo.

(B.) But if we are to look beyond the writings to ascertain who were insured, we inevitably arrive at the same result. The policy is certainly broad enough to cover the liability of Morse & Co. as common carriers. To ascertain whether they were so insured we have, therefore, simply to look at the evidence to determine whether, when they made their application, they intended to so insure themselves. The intent of the person insuring under such a policy governs, whether it is communicated to the insurers or not.

Hooper vs. Robinson, 98 U. S., 528.
The Sidney, 27 Fed. Rep., 119.

That they did so intend would seem to be clear from the testimony.

First. The application is to have the loss payable to themselves or order.

Second. Henry Morse testifies as follows:

Q. Now, will you be kind enough to tell me in what sense either yourself or the owner got the benefit of that insurance?

A. With the understanding with the insurance company that *ourselves* as *common carriers* and the captain are protected when we take a policy from them.

Q. Protected in what way?

A. From loss.

Q. Protected against whom?

A. Protected against any loss that may occur while a cargo is in transit, after being insured, from Buffalo to New York, or to any other port (fol. 100).

If Mr. Morse so understood the insurance it is evident that he must have intended it to have that effect. He, however, testifies positively that the intent was to insure themselves and the captain in this case (fol. 57).

The intent of the companies was the same, for their agent who issued the policies testifies that he understood H. Morse & Co. to be the ones to be benefited, and that he could not regard anybody else than those specified in the insurance (fol. 77). And he further testifies that the understanding was that Morse & Co. and the boat were to be protected against loss, the carrier as well as Morse & Co.

Alanson Morse also testifies that their intent was to protect Wager and themselves, and that the certificate was indorsed and given to Meadows simply as collateral security. (Fols. 65, 66.)

Third. The evidence clearly shows that the settled custom of the business in which Morse & Co. were engaged, and in which they took out this insurance, was for the middlemen (such as Morse & Co. were) to insure themselves against liability as common carriers, and to indorse the certificate in blank and give it to the shipper as collateral security. The evidence in the case discloses that this is the very thing that was done, and that the intent of the Morses was to proceed in accordance with this custom. The writings show on their face that Morse & Co. were insured, and that they endorsed the certificate (which made the insurance payable to themselves or order) *in blank*, and gave it to Mr. Meadows.

They did not know who the owners of the cargo were. (Fol. 66.) This practice accounts for the mode of doing the business, and plainly shows the intent of Morse & Co., for the actual owner not being known, and the bill of lading being liable to be transferred, and the cargo to change owners before the voyage is completed, it is impossible to ascertain who the person is to whom the carrier may ultimately be liable, and who is to get the benefit of the insurance in case of loss, and the middlemen (the Morses in this case) therefore insure against their liability, and, as common carriers, to the full value of the cargo, get the certificate made payable to themselves or order, indorse it *in blank*, attaching it to the bill of lading and giving it to the shipper, thus making the loss payable to the owner of the grain, and protecting all parties.

In addition to this, Henry Morse testifies that he was well acquainted with the mode of doing business (fol. 89); and he further

testifies that no arrangement was made with Meadows, other than the usual transaction in the course of the business (fol. 54). Alanson Morse's evidence also shows distinctly that the transaction was simply one in the usual course of the business, for he says the insurance was intended to protect themselves, and that the certificate was indorsed over as collateral security, and that the shipment was made in the usual way (fols. 65, 66).

Whether, therefore, the question is determined upon the face of the writings, or from the intent of the parties taking out the insurance, the result is the same, for upon the writings Morse & Co. are insured, while upon the undisputed evidence of both Henry Morse and Alanson Morse, who took out the insurance, their intent was to protect themselves and Wager against all loss, and the evidence of the insurance agent shows distinctly that he so understood their intent, while in both cases it is plain that the insurance was, and was intended to be, against the liability of the Morses as common carriers, whoever else may have been intended to be protected.

There is no question here of the position of the parties. The carrier receives the cargo and agrees to deliver it safely at its destination. Nothing excuses him but an act of God or public enemies. It is to insure the carrying out of this agreement that the owner of the cargo wishes additional security to the responsibility of the carriers, and it is to insure it to the satisfaction of the owner of the grain that the carrier, as carrier, procures insurance on the cargo.

There is not a suggestion of securing the owner as owner, for that is not the intent of the parties, nor the scope of the agreement. They want the insurance of the carrier as carrier, that he will perform his contract and deliver the grain.

In *Savage vs. the Corn Exchange Co., 36 N. Y., 655-6*, the Court of Appeals said: "The plaintiff was a common carrier, and received "the grain for transportation. As such he was bound to make safe "delivery at the place of destination, unless excused by the act of "God or the public enemy. His obligation to the owner of the cargo, "as well as his interest therein for advances and freight, vested in "him an insurable interest, to the extent of the fair value of the prop-"erty covered by the contract of indemnity."

In the present case the testimony is uncontradicted, that the insurance was paid by the carrier out of the freight money; that the insurance ran to the carriers; that the owners as such were not to be

insured is shown by the fact that the insurance, that is, the certificate, is transferred to them by indorsement. Not being originally parties to the contract of insurance, the insured gives them the benefit of it by indorsing the certificate to them, thus appointing them to receive the money. When they are paid, after a loss, they take the money as asignees of the insured, that is, the carriers; because by indorsing the certificate to them, the carrier, who is the original insured, has authorized them to receive the money from the insurance company, not as being originally insured.

These facts and the relations thus established solve the question raised in this case.

Leaving the facts of the assignment of the certificate out of the question for a moment, and assuming a loss to have occurred, then the position of the parties would have been this: The carrier would be liable to the owner of the grain to the amount of its value for not delivering it; the insurance company would be liable to the carrier for its value under its contract of insurance. The insurance company would pay the carrier, the carrier would pay the owner.

By bringing in the assignment of the certificate we do not change the position of the parties, except that the owner now has assurance that if a loss occurs the insurance money will be paid to him directly, instead of through the carrier, and he avoids the risk of the carrier's being pecuniarily irresponsible.

The insurance company having discharged its obligation by paying the insurance to the original insured, or his assignee, cannot recover it back. It would be absurd to say that they can pay, with one hand and take back with the other.

Subrogation means that having paid the insurance the insurer becomes the assignee of the insured's cause of action against some third person. The insured cannot have a cause of action against himself.

The libelant's counsel, in his brief, constantly speaks of this case as if it was a suit against the carriers for negligence. This is unfair, and conveys a wrong impression. There is no question of negligence in the case, nor is that question litigated. The libel sets forth the carriers' agreement and its non-fulfillment by not delivering the grain. That it was lost *in transitu* from a peril insured against and being abandoned to the libelants as insurers, they, as owners of the

grain, are entitled to sue the carriers for not delivering the grain as they had agreed.

The question whether the grain was lost by negligence or not is not in the case, and could not be litigated.

Another strange claim made by the libelants is that the cargo owners paid the insurance or that nobody paid it.

It was paid by the carrier. The Court will bear in mind that there are nominally two distinct carriers of the cargo before the Court, Wager, the boat owner and captain, signs a bill of lading, and is a carrier. The Morses, as middlemen, sign a bill of lading, and assume a carrier's liabilities, thus becoming carriers. The Morses contract to carry the grain at a given rate per bushel, it being understood under the usual course of doing the business that they will procure the cargo to be insured as carriers and assign the insurance certificate to the cargo owners as further or collateral security for the bill of lading. The Morses obtain the insurance, they charge the amount to Wager, and deduct it from his freight (fol. 61). This is a payment of the insurance premium by the carrier.

It is submitted that the libelant, having paid a loss on a risk it insured against, to the assignee of the insured, cannot be subrogated to any right to recover the money back from the insured.

POINT FOUR.

The decree in the Sydney case is not *res adjudicata* as against the appellees.

The Sydney case (reported in 23 Fed. Rep., p. 88; and 27 Fed. Rep., p. 363) was an action *in rem* against the canal boat Worden which carried the cargo and the steamer Sydney which was towing her, the actual carrier Wager, who was the owner of the boats, appearing as claimant, the appellees herein not being parties to the action, but being merely sureties upon the bond given for the release of the Worden (see findings fol. 128). In that case the question as to the liability of Wager, the owner of the boat was up, his defense being that he was insured by the policy in question as carrier and that therefore there could be no subrogation against him. This appears from the evidence last referred to, from the opinion of Judge Brown and that of Judge Wallace which appear in the reported decisions

of the case, from a memorandum of opinion herein (fol. 123) and from the decree in that case (fol. 30 et seq.).

Two things thus appear: first, that the appellees herein were not parties to the Sydney case and therefore had no opportunity whatever to litigate the question of their personal liability, and second, the only question necessary to the determination of the Sydney case which in any manner included questions similar to those in the present litigation, was whether Wager, as carrier, was insured, the question as to whether the appellees herein were insured not being necessary to the determination of that case, and in fact not being passed upon. (See memorandum of opinion herein, fol. 123.)

It hardly needs citation of authorities to the effect that a judgment or decree where the question is one of personal liability, is not *res adjudicata* as to one not a party to the suit, nor that the judgment or decree determines only those matters involved necessarily, by implication, or by actual litigation.

The appellants herein were not parties to the Sydney case nor were they privies thereto, as their liability depended upon very different legal propositions from those of Wager, and is based upon facts that would not prevent Wager's liability, and in addition they had no control over the Sydney litigation, they could not offer evidence, cross-examine witnesses, nor take an appeal. The rule in such cases is well laid down by Judge McCrary in the case of Miller vs. Liggett, &c., Co., 2 McCrary's Reports, 375. At page 377 the learned Judge says: "But I am of the opinion that a person, to be concluded by the judgment, must be privy to the proceeding in such a "sense that he may control the litigation in so far as making "motions in the case, offering evidence, cross-examining witnesses or "taking an appeal is concerned; that is, it is not reasonable to say "that a man shall be bound by an adjudication, unless he has all the "ordinary rights of a litigant with respect to the adjudication."

As we have stated, the question as to the liability of the appellants herein was not involved in the Sydney case and the Court was not called to adjudicate upon it; for that reason it is neither a bar nor does it operate as an estoppel against the appellants herein. It is well settled that a judgment or decree is not a bar in another action on a different claim and demand and that it can only operate as an estoppel in such an action as to those matters which were in

issue or points controverted and upon which the determination is rendered. (Cromwell vs. County of Sac, 94 U. S. Rep., 351.)

POINT FIVE.

The appeal should be dismissed for the reason, that so far as these appellants are concerned the amount involved is less than five thousand dollars.

The decree in the District Court was against these appellees for the sum of four thousand six hundred and seventeen dollars and sixteen cents and no more (fol. 23). Upon the appeal to the Circuit Court consent was given that if the decree of the District Court were affirmed, a decree might be entered in the Circuit for the sum of six thousand one hundred and seventy-five dollars and eighty-nine cents, (fol. 34), this being done as is apparent from the record in order that there might be an appeal, if the decree of the Circuit were against these appellants. The Circuit Court reversed the decision of the District Court and there was therefore no decree against these appellees ever entered for a larger amount than four thousand six hundred and seventeen dollars and sixteen cents. The question as to whether the District Court erred in fixing the amount is not up and cannot be presented to this Court.

The amount actually involved determines the jurisdiction. (See Dows against Johnson, 110 U. S. Reports, 223; and Bowman against The Chicago Northwestern Railway Company, 115 U. S. Reports, 611.)

The stipulations of the parties could not of course confer jurisdiction. (See cases last cited, also Lee vs. Watson, 1 Wallace, 163, and Elgin vs. Marshall, 106 U. S. R., 578, pp. 580, 582.)

The amount of the liability of the appellees herein as fixed by the District Court determines the amount involved so far as this appeal is concerned.

While it is true that the appellants herein claim more than five thousand dollars in their libel, yet they assented to the amount of appellees' liability being less, by failing to appeal, and therefore, so far as appears upon the record the amount which they would be entitled to recover stands unquestioned by them as being less than

five thousand dollars. Upon reversal of the decree of the Circuit Court, the appellants herein would be entitled merely to an affirmance of the decree of the District Court, and, therefore, as to them the amount involved is only $4,617.16. (See Schenck vs. Marx, 125 N. Y. R., 703.)

POINT SIX.

The appeal should be dismissed with costs in favor of the appellees.

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